No. 16-1027	
Title:	**Ryan Austin Collins, Petitioner** **v.** **Virginia**
Docketed:	February 24, 2017
Lower Ct:	Supreme Court of Virginia
Case Numbers:	(151277)
Decision Date:	September 15, 2016
Rehearing Denied:	November 22, 2016
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Feb 21 2017	Petition for a writ of certiorari filed. (Response due March 27, 2017)
Mar 20 2017	Waiver of right of respondent Virginia to respond filed.
Mar 27 2017	Brief amici curiae of United States Justice Foundation, et al. filed.
Apr 05 2017	DISTRIBUTED for Conference of April 21, 2017.
Apr 12 2017	Response Requested. (Due May 12, 2017)
Apr 24 2017	Order extending time to file response to petition to and including June 12, 2017.
Jun 07 2017	Brief of respondent Virginia in opposition filed.
Jun 21 2017	DISTRIBUTED for Conference of September 25, 2017.
Jun 22 2017	Reply of petitioner Ryan Austin Collins filed. (Distributed)
Sep 28 2017	Petition GRANTED.
Nov 13 2017	Joint appendix filed. **Main Document** **Proof of Service**

Nov 13 2017	Brief of petitioner Ryan A. Collins filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 17 2017	SET FOR ARGUMENT ON Tuesday, January 9, 2018
Nov 17 2017	Brief amicus curiae of Institute for Justice filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 17 2017	Brief amicus curiae of Restore the Fourth, Inc. filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 20 2017	Brief amicus curiae of The National Rifle Association Freedom Action Foundation filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 20 2017	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 20 2017	Brief amicus curiae of The Cato Institute filed. **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 20 2017	Brief amicus curiae of Fourth Amendment Scholars filed. (Distributed) **Main Document** **Other** **Certificate of Word Count** **Proof of Service**
Nov 20 2017	Brief amicus curiae of American Motorcyclist Association filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 20 2017	Brief amici curiae of Conservative Legal Defense and Education Fund, et al. filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 20 2017	Brief amicus curiae of The Rutherford Institute filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Nov 22 2017	CIRCULATED.
Dec 13 2017	Brief of respondent Virginia filed. **Main Document** **Proof of Service** **Certificate of Word Count**
Dec 18 2017	Record requested from the Supreme Court of Virginia.
Jan 02 2018	Reply of petitioner Ryan A. Collins filed. (Distributed)

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Jan 04 2018	Record received from the Commonwealth of Virginia in the Circuit Court of the county of Albemarle. (1 Envelope).		
Jan 05 2018	Record received from the Court of Appeals of Virginia. (1 Envelope).		
Jan 09 2018	Argued. For petitioner: Matthew A. Fitzgerald, Richmond, Va. For respondent: Trevor S. Cox, Acting Solicitor General of Virginia, Richmond, Va.		
Jan 17 2018	Record received from the Supreme Court of Virginia is electronic.		

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RECORD AND BRIEFS

No. 16-1027

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IN THE
Supreme Court of the United States

RYAN AUSTIN COLLINS,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

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February 21, 2017

QUESTION PRESENTED

Whether the Fourth Amendment's automobile exception permits a police officer, uninvited and without a warrant, to enter private property, approach a home, and search a vehicle parked a few feet from the house.

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Petitioner Ryan Austin Collins respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Virginia.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia is reported at 790 S.E.2d 611 (Va. 2016). App. 1. The decision of the Court of Appeals of Virginia is reported at 773 S.E.2d 618 (Va. Ct. App. 2015). App. 32. The decision of the Circuit Court of Albemarle County was issued from the bench and is not reported, but is reprinted at App. 50.

JURISDICTION

The Supreme Court of Virginia entered judgment on September 15, 2016. App. 26. It then denied Collins's petition for rehearing on November 22, 2016. App. 111. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Virginia Code § 18.2-108, upon which Collins was convicted, reads:

> A. If any person buys or receives from another person, or aids in concealing, any stolen goods or other thing, knowing the same to have been stolen, he shall be deemed guilty of larceny thereof, and may be proceeded against, although the principal offender is not convicted.
>
> B. If any person buys or receives any goods or other thing, used in the course of a criminal investigation by law enforcement that such person believes to have been stolen, he shall be deemed guilty of larceny thereof.

STATEMENT OF THE CASE

I. Factual history.

The facts are not in dispute. Officers McCall and Rhodes of the Albemarle County Police Department were looking for the person who eluded them on a motorcycle in two high-speed incidents. App. 3. The rider's helmet had obscured his face. App. 3, 67, 70. For reasons not relevant here, the officers suspected Petitioner, Ryan Collins. App. 3, 5.

A few months after the eluding incidents, Officers McCall and Rhodes encountered Collins at the DMV. App. 5. During their conversation, one officer visited Collins's Facebook page and spotted a picture of a motorcycle, covered by a tarp, parked at a house. Collins told the officers he did not know anything about the motorcycle. App. 5.

After leaving the DMV, Officer Rhodes located the house in the photograph on Dellmead Lane. App.

5-6. Collins's girlfriend (and mother to his child) lived there, as did Collins himself at least several nights each week. App. 27, 91. The court below thus referred to the Dellmead Lane house as "Collins's residence," which is accurate for Fourth Amendment purposes.[1] App. 12.

The Dellmead Lane house was a brick rancher. App. 56-57. Its driveway ran from the street up to the left side of the house. App. 30, 112 (photograph). The driveway passed the front threshold of the house, and came to a dead end about halfway alongside the left side of the building. App. 30, 114 (photograph).

A dark colored car was parked about halfway up the driveway, where a visitor might pass to reach the front door. App. 112-13 (photographs). A motorcycle covered in a white tarp sat behind that car. App. 6, 112-13 (photographs). The motorcycle rested on the part of the driveway running past the house's front perimeter. App. 30. This portion of the driveway was enclosed on three sides: the home on one side, a brick retaining wall on the opposite side, and a brick wall in the back. App. 30, 57, 114 (photograph). The motorcycle was no more than a car's length away from the side of the dwelling. App. 30, 114 (photograph).

Seeing the motorcycle covered in a tarp, Officer Rhodes walked onto the driveway. App. 6. He did not have permission to go onto this property. App. 88. Officer Rhodes then entered the partially enclosed parking space alongside the home, removed the tarp, and obtained the license tag and VIN number. App. 6.

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[1] "An overnight guest in a home may claim the protection of the Fourth Amendment." *Minnesota v. Carter*, 525 U.S. 83, 90 (1998).

After running the VIN number, Officer Rhodes learned the motorcycle was flagged as stolen. App. 6. Officer Rhodes knocked at the front door, and Collins answered. App. 6. Collins admitted that he owned the motorcycle. App. 7-8. Officer Rhodes then arrested Collins for possession of stolen goods. App. 8.

II. Proceedings below.

Collins was charged with receiving stolen property with knowledge that it was stolen. App. 8.

Moving to suppress, Collins challenged Officer Rhodes's trespass onto curtilage as unconstitutional. App. 8, 97-98. Collins also argued that the automobile exception did not apply to vehicles located on private property. App. 8, 97-98, 103-04. The Circuit Court of Albemarle County denied the motion to suppress. App. 10. Collins was later convicted of the charge. App. 10.

Collins appealed. The Court of Appeals of Virginia observed that the Commonwealth "[did] not dispute that Officer Rhodes's actions constituted [Fourth Amendment] searches." App. 38. The court reasoned that the only question before it was what exceptions (if any) to the Warrants Clause justified Officer Rhodes's warrantless searches. App. 38.

The Court of Appeals assumed the partially enclosed parking space where the motorcycle was parked was curtilage. App. 40-41. The court also reflected in a footnote that the automobile exception might not apply to vehicles on private property. App. 43. But the court held "Officer Rhodes acted lawfully under the Fourth Amendment in entering the property and searching the motorcycle." App. 44.

Collins again appealed, and the Supreme Court of Virginia granted his petition.

The court applied what it called a "simple, bright-line test for the automobile exception." App. 14. "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more." App. 14-15 (quoting *Maryland v. Dyson*, 527 U.S. 465, 467 (1999)). Simply applying this rule to the motorcycle and facts of this case, the court held that probable cause existed. App. 15 ("Officer Rhodes had several reasons to believe the motorcycle was contraband."). Nor was there any real question that the motorcycle was "readily mobile." Accordingly, the warrantless searches were lawful. *Id.*

The court then added that the automobile exception applied to the motorcycle even though it was located on private property. App. 19-20. The court's justification was threefold. First, the U.S. "Supreme Court has never limited the automobile exception such that it would not apply to vehicles parked on private property." App. 20. Second, "[o]ur Court has held that there is no reasonable expectation of privacy in a vehicle parked on private property yet exposed to public view." App. 20. Third, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), and *California v. Carney*, 471 U.S. 386 (1985), "did not distinguish the automobile exception on a public roadway versus on a private driveway." App. 20. Instead, *Carney* focused only on finding that the automobile exception applied to a motor home. App. 20. And any reliance on *Coolidge* "is misguided" because "the *Coolidge* plurality opinion cannot be fairly read to create a bright-line rule precluding warrantless searches on

private property under all circumstances." App. 21 (quoting *United States v. Brookins*, 345 F.3d 231, 237 (4th Cir. 2003)). The court then held that the automobile exception applies to a vehicle located on private property. App. 21-22.

The court concluded that Officer Rhodes' Fourth Amendment searches were "justified" under the automobile exception, and affirmed. App. 26; App. 111 (denying rehearing).

REASONS FOR GRANTING THE PETITION

The issue here is whether the automobile exception permits police to enter private, residential property (specifically, the curtilage of the home), and to search vehicles there without a warrant.

The Supreme Court of Virginia held that the automobile exception permits such a warrantless search. That was a serious constitutional error.

To be sure, the automobile exception is easily applied to most circumstances. In general, if "a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more." *Maryland v. Dyson*, 527 U.S. 465, 467 (1999).

But this Court has always stopped short of applying that rule on private, residential property. *Coolidge v. New Hampshire*, 403 U.S. 443, 474-75, 479-80, 482 (1971) (majority opinion); *id.* at 458-64 (plurality opinion) (police towed a car from the defendant's driveway after arresting him; the court found no automobile exception applied). Residential private property implicates heightened privacy

interests different from cars operating on public streets, parking lots, or gas stations. A search of a vehicle pulled over on the side of a public highway is constitutionally different from a search of a vehicle parked alongside a house. *California v. Carney*, 471 U.S. 386, 392-93 (1985).

If police can search a car *wherever* they find it with no warrant, this Court's protection of the curtilage will lose much of its value. *Florida v. Jardines*, 133 S. Ct 1409, 1414-15 (2013) (observing that curtilage should receive the same protections as the home).

Yet the Supreme Court of Virginia is not alone in broadening the automobile exception. *See, e.g., United States v. Hatley*, 15 F.3d 856, 859 (9th Cir. 1994) (holding that "the vehicle exception applies to a search of a vehicle parked in a private driveway" and permitting a warrantless search of the defendant's car in his driveway); *Harris v. State*, 948 So.2d 583, 597 (Ala. Ct. Crim. App. 2006) (holding that "the automobile exception applies to vehicles located on private property without any additional exigency requirement," and permitting a warrantless search of a vehicle parked *behind* the defendant's house).

Other courts, however, properly disagree. *United States v. Fields*, 456 F.3d 519, 524-25 (5th Cir. 2006) (holding that "the automobile exception may not apply when a vehicle is parked at the residence of the criminal defendant"); *State v. Vickers*, 793 S.E.2d 167, 171 (Ga. Ct. App. 2016) (holding that "vehicles, like any other item or location within the curtilage of a residence, are not to be searched without a warrant, consent, or exigent circumstances" and refusing the apply the exception to a search of a car in a

defendant's driveway); *Redwood v. Lierman*, 772 N.E.2d 803, 813 (Ill. App. Ct. 2002) (observing that "one's backyard is a vastly different place, for purposes of the Fourth Amendment, than a public street," and refusing the apply the automobile exception to a vehicle parked on curtilage).

Certiorari is warranted here to resolve the split of authority and to clarify the proper scope of the automobile exception to the Fourth Amendment's warrant requirement.

I. The Supreme Court of Virginia erred by significantly expanding the automobile exception.

A. The automobile exception does not permit officers to enter curtilage.

The court below applied a "simple, bright-line test for the automobile exception." App. 14. Quoting *Maryland v. Dyson*, the court reflected "[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more." App. 14-15. Simply applying this rule to the motorcycle and facts of the case, the court held the warrantless searches lawful. App. 15.

This Court's "bright line rule" cannot apply to vehicles parked on private, residential property—particularly the curtilage of the home. If it did, any vehicle with probable cause could be searched anywhere, any time. Officers could creep into garages and carports at night, removing tarps, rummaging for contraband in glove boxes. If officers can intrude upon curtilage to search a vehicle, there is no reason why

they could not walk through a house to reach a car in the backyard. All of this could occur with no warrant and no special exigency. *Dyson*, 527 U.S. at 466 (the automobile exception "has no separate exigency requirement").

The automobile exception has two premises—inherent mobility and a reduced expectation of privacy. *Carney*, 471 U.S. at 390-92. Both are unique to vehicles.

The second of these premises is absent in the curtilage of the home. The law "regard[s] the area immediately surrounding and associated with the home—what our cases call the curtilage—as part of the home itself for Fourth Amendment purposes." *Jardines*, 133 S. Ct. at 1414. "At common law, the curtilage is the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life, and therefore has been considered part of home itself for Fourth Amendment purposes." *Oliver v. United States*, 466 U.S. 170, 180 (1984). "This area around the home is intimately linked to the home, both physically and psychologically, and is where privacy expectations are most heightened." *Jardines*, 133 S. Ct. at 1415. "The protection afforded the curtilage is essentially a protection of families and personal privacy." *California v. Ciraolo*, 476 U.S. 207, 212-13 (1986).

Accordingly, the automobile exception has never authorized warrantless searches intruding upon places like the home. *See United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976) ("[O]ne's expectation of privacy in an automobile and of freedom in its operation are significantly different from the traditional expectation of privacy and

freedom in one's residence."). The automobile exception does not permit police to search homes and curtilage, even if they are ultimately looking for a vehicle. "[N]o Supreme Court decision allows warrantless entry into areas of a home or business where the owner has a reasonable expectation of privacy simply because the police are in search of an automobile." *Binder v. Redford Twp. Police Dep't*, 93 F. App'x 701, 703 (6th Cir. 2004) (holding that an officer's warrantless entry into a garage to seize a motorcycle was not justified by the automobile exception).

B. The search here intruded on the curtilage of the home.

Here, Officer Rhodes walked into a partially enclosed space alongside the house. He did not "walk and talk" up to the front porch. *See Jardines*, 133 S. Ct. at 1415 n.1. Instead, to investigate the motorcycle, Officer Rhodes walked past the front porch. App. 30, 113-14 (photographs). The motorcycle was enclosed on three sides: the home on one side, a "retaining wall" on the opposing side, and a brick wall along the back. App. 30, 57, 114. Only the entryway into the parking space was open. This private space was a dead end, where home visitors would not normally walk. *Jardines*, 133 S. Ct. at 1422 (Alito, J., dissenting) ("Of course, this license has certain spatial and temporal limits. A visitor must stick to the path that is typically used to approach a front door, such as a paved walkway.").

As the photographs show, the motorcycle sat just a few feet from the side of the house, "beyond the front perimeter wall of the house." App. 30, 112-14.

This was curtilage, as "easily understood from our daily experience." *Jardines*, 133 S. Ct. at 1414-15 ("[The Fourth Amendment's protection of the home] would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window.").

In fact, "[t]he Commonwealth does not dispute that Officer Rhodes's actions constituted searches." App. 38. If the partially enclosed parking space was not curtilage, there would be no Fourth Amendment search by entering into the area. Officer Rhodes would have simply walked on an "open field." *United States v. Jones*, 565 U.S. 400, 411 (2012). By conceding that entering the area was a Fourth Amendment search, the Commonwealth conceded that the partially enclosed parking space was curtilage. *See id.*

II. There is no proper justification for expanding the automobile exception.

The Supreme Court of Virginia's primary error was simply applying an apparent bright-line rule to circumstances that are meaningfully different. App. 14-15 (quoting *Dysons* and "applying that test").

Along the way, the court made several errors. First, it wrongly discounted this Court's decisions in *Coolidge* and *Carney*. Second, it held that this Court has never limited the automobile exception to public property. Third, it relied on its own precedent about the plain view doctrine—which confuses the Fourth Amendment interests at stake here.

A. *Coolidge* and *Carney* recognized privacy interests in residential property.

The Supreme Court of Virginia wrongly believed that *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), and *California v. Carney*, 471 U.S. 386 (1985) did not constrain its analysis. App. 20.

In *Coolidge*, two cars were parked in the defendant's driveway. 403 U.S. at 447-48. After arresting Coolidge, the police towed his cars and searched them. *Id.* at 447. In one of the cars, police found evidence incriminating Coolidge in the murder of a 14-year old. *Id.* at 448. New Hampshire argued that the car searches were permitted under the automobile exception. *See id.* at 458-64 (plurality opinion). The Court rejected that argument, and threw out the evidence.

The *Coolidge* plurality stated that "the word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." 403 U.S. at 461 (Section II-B). The plurality noted that "it seems abundantly clear that there is a significant constitutional difference between stopping, seizing, and searching a car on the open highway, and entering private property to seize and search an unoccupied, parked vehicle not then being used for any illegal purpose." *Id.* at 463 n.20. The plurality found the automobile exception "simply irrelevant." *Id.* at 462.

Moreover, a majority in *Coolidge* defended the presumption of requiring a warrant, even for some car searches. *See id.* at 473-84 (Section II-D); *id.* at 491

(Harlan, J., concurring). The majority expressed alarm at the idea of a bright line rule that would permit a search of *any* automobile, *anywhere*, so long as probable cause existed. *Id.* at 479 (observing that, if no warrant was required to search a car where there was "no stopping, and the vehicle was unoccupied," then "it is but a short step to the position that it is *never* necessary for the police to obtain a warrant before searching and seizing an automobile").

In other words, "if the police may, without a warrant, seize and search an unoccupied vehicle parked on the owner's private property, not being used for any illegal purpose, then it is hard to see why they need a warrant to seize and search a suitcase, a trunk, a shopping bag, or any other portable container in a house, garage, or back yard." *Id.* at 480. The *Coolidge* Court held that such a result "would cast into limbo the whole notion of a Fourth Amendment warrant requirement." *Id.* at 483.

This is a clear statement that the *Coolidge* majority meant to stop short of permitting warrantless, non-exigent searches of cars on the owner's private property. After all, the Court *invalidated the search in that case.*

Similarly, in *California v. Carney*, 471 U.S. 386 (1985), this Court again limited the scope of the automobile exception.

In that case, police had probable cause to believe that Carney was selling marijuana in a motor home parked in a city parking lot. *See id.* at 388. "Without a warrant or consent, one agent entered the

motor home" and saw drugs. *Id.* The motor home was seized and searched, and more drugs were found. *Id.*

The *Carney* Court began by recognizing the two rationales for the automobile exception. First, automobiles are readily movable. *Carney*, 471 U.S. at 390-91. Second, automobiles carry a lower expectation of privacy, derived "from pervasive regulation of vehicles capable of traveling on the public highways." *Id.* at 391-92. This Court then announced when these underlying justifications for the automobile exception "come into play." *Id.* at 392-93. Those justifications are present "[w]hen a vehicle is being used on the highways, or if it is readily capable of such use *and is found stationary in a place not regularly used for residential purposes*—temporary or otherwise." *Id.* (emphasis added).

This Court then applied those principles to the facts of the case. The Court determined that the motor home was readily mobile, licensed to operate on public streets, and "was so situated" that it would be objectively understood as being used as a vehicle and not a residence. *Id.* at 393. That is, the motor home was "parked" in a "lot"—it was "stationary in a place not regularly used for residential purposes." *Id.* at 392. The automobile exception applied. *Id.* at 392-93.

Both *Coolidge* and *Carney* reflect this Court's interest in reserving application of the automobile exception to cars parked on residential private property, such as the curtilage in this case.

The Supreme Court of Virginia set *Coolidge* and *Carney* aside by stating that "those cases did not distinguish the automobile exception on a public

roadway versus on a private driveway." App. 20. But the *Coolidge* plurality—and arguably the majority—did exactly that by affirming the automobile exception on the open highway but finding it inapplicable to the suspect's unoccupied car, sitting in his driveway. 403 U.S. at 461-63 (plurality opinion); *id.* at 479-80 (majority opinion). The *Carney* Court also repeatedly noted that the motor home searched in that case was located in a parking lot, and not in a place "regularly used for residential purposes." 471 U.S. at 392.

B. The court failed to focus on the privacy and property interests in *residential* private property.

The Supreme Court of Virginia further held "[t]he Supreme Court has never limited the automobile exception such that it would not apply to vehicles parked on private property." App. 20. Even setting aside *Coolidge* and *Carney*, this reasoning does not support expanding the automobile exception to private, residential property and curtilage.

Naturally, many car searches occur on public property. *See, e.g.*, *United States v. Ross*, 456 U.S. 798, 801 (1982) (car stopped on public street); *Brinegar v. United States*, 338 U.S. 160, 162-63 (1949) (car stopped on public highway).

Other car searches occur on private property, but do not implicate the residential privacy of the car's owner. *See, e.g.*, *Carney*, 471 U.S. at 392; *Pennsylvania v. Labron*, 518 U.S. 938, 939 (1996) (in the second paired case, car was on driveway to farmhouse owned by a non-defendant); *California v. Acevedo*, 500 U.S. 565, 567 (1991) (car was stopped

and searched after it "started to drive away" from apartment complex parking lot). And sometimes, private property stands open to the public or is not used for residential purposes. *See, e.g.*, *Colorado v. Bannister*, 449 U.S. 1, 1 (1980) (car searched at a service station); *South Dakota v. Opperman*, 428 U.S. 364, 366 (1976) (car searched at an impound lot).

None of those cases factually undercut the privacy interests raised by searches on private property used for residential purposes—like the curtilage used by Collins.

Similarly, the Supreme Court of Virginia reflected upon its previously holding "that there is no reasonable expectation of privacy in a vehicle parked on private property yet exposed to public view." App. 20. This point has little relevance here. Of course, observation of effects left in plain view does not give rise to a Fourth Amendment search. *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993). But the plain view doctrine says nothing about the physical intrusions of this case: physical entry onto curtilage within a few feet of the house and removal of a tarp to read a VIN number.

This focus on privacy interests also obscures the interests implicated in this case. At issue here are also Collins's property interests infringed upon by a physical entry onto curtilage and subsequent vehicle search. The related context of determining when a Fourth Amendment search occurs is instructive.

"The text of the Fourth Amendment reflects its close connection to property, [and this Court's] Fourth Amendment jurisprudence was tied to common-law

trespass, at least until the latter half of the 20th century." *Jones*, 565 U.S. at 405. The Court's later cases, originating in *Katz v. United States*, introduced an "expectations of privacy" analysis to determine when a Fourth Amendment search occurred. *Jones*, 565 U.S. at 405-06. Importantly, however, these later cases did not override (but merely added to) the Fourth Amendment's adherence to protecting property rights. *Id.* at 406-07. That property-based approach continues to endure. *See, e.g.*, *Jardines*, 133 S. Ct at 1414-15 (the unlicensed physical intrusion onto a porch was a Fourth Amendment search).

The same privacy and property interests are implicated by the issue here. The officer's unlicensed, physical intrusion upon curtilage and the removal of a tarp were Fourth Amendment searches. To ignore the property interests implicated by those searches, when determining whether a bright-line exception to the Warrant Clause should apply, incorrectly diminishes the Fourth Amendment's protection of property interests. *See Soldal v. Cook Cty.*, 506 U.S. 56, 64 (1992) (Fourth Amendment's protection of privacy interests under *Katz* did not "snuff[] out the previously recognized protection for property"). Instead, both property and privacy rights are infringed upon by the warrantless search of an automobile on curtilage. *See Jardines*, 133 S. Ct. at 1419 (Kagan, J., concurring) ("It is not surprising that in a case involving a search of a home, property concepts and privacy concepts should so align."). Both types of property interests should be considered when determining whether the automobile exception extends to such Fourth Amendment searches.

III. Courts are split about whether the automobile exception applies on the defendant's private, residential property.

Whether the automobile exception applies to a vehicle located on residential private property is "a significant unresolved issue." *United States v. Goncalves*, 642 F.3d 245, 250 (1st Cir. 2011) (not resolving the issue because it was unpreserved and there was no miscarriage of justice on the facts presented).

Some courts hold that the automobile exception does not apply to vehicles parked on the defendant's private, residential property. *See, e.g., United States v. Fields*, 456 F.3d 519, 524-25 (5th Cir. 2006). Other courts hold that the automobile exception applies everywhere, even on a private driveway. *See Goncalves*, 642 F.3d at 251 (observing that the Seventh, Eighth, and Ninth Circuits "have squarely applied the automobile exception to permit searches of vehicles parked in the driveway of the defendant's own residence").

A. The Fifth Circuit, Tenth Circuit, Georgia, and Illinois require a warrant for searches like those here.

The Fifth Circuit holds the "automobile exception may not apply when a vehicle is parked at the residence of the criminal defendant challenging the constitutionality of the search." *Fields*, 456 F.3d at 524-25; *id.* at 525 ("[E]xigent circumstances are required to justify a warrantless search of a vehicle when the vehicle is parked in the driveway of a

residence."). Under the facts presented in *Fields*, however, the exception did apply, because the private property was not Fields's residence, and because the car was not parked in the driveway. *Id.* (citing *Coolidge* and *Carney*, and noting that "Fields'[s] vehicle was not parked in the driveway. Rather, Fields had crashed the car into the side of the building.").

Similarly, in *United States v. Reed*, 26 F.3d 523, 529-30 (5th Cir. 1994), the Fifth Circuit addressed a warrantless search of a car in the defendant's driveway. The court evidently rejected the simple automobile exception under those facts. Instead, the court engaged in an extensive analysis before finding exigency that supported the warrantless search. In that case, the crime was bank robbery, the officers suspected the money was in the trunk of the car—it was emitting a radio signal—and they traced the car quickly to a driveway, where much of the neighborhood turned out to observe. Concern about confederates or others with keys to the car having access to the stolen money justified the warrantless search. *Id.* at 530.

The Fifth Circuit recently reaffirmed its position that separate exigency is required to support a warrantless search of a vehicle in the defendant's driveway. *See United States v. Beene*, 818 F.3d 157 (5th Cir. 2016). In *Beene*, the Fifth Circuit carefully laid out the automobile exception and its normal application, but then observed: "when a vehicle is parked in the defendant's residential driveway, we generally require that there be exigent circumstances justifying a search." *Id.* at 164. The *Beene* court vacated and remanded the case for the district court

to determine, in the first instance, whether such exigency existed.

Similarly, the Tenth Circuit "acknowledge[s]" that the automobile exception "'may not apply when [a vehicle] is parked at the residence of the criminal defendant challenging the constitutionality of the search.'" *United States v. DeJear*, 552 F.3d 1196, 1202 (10th Cir. 2009) (quoting *Fields*, 456 F.3d at 524-25). In *DeJear*, the vehicle had been parked on residential private property. *Id.* at 1198. But the defendant did not argue that it was *his* residence. *Id.* at 1202. Thus, the automobile exception applied. *Id.*

Georgia recognizes that the automobile exception does not apply to vehicles parked on "the curtilage of a private residence." *State v. Vickers*, 793 S.E.2d 167, 170 (Ga. Ct. App. 2016). "[T]he established Georgia rule [is] that vehicles, like any other item or location within the curtilage of a residence, are not to be searched without a warrant, consent, or exigent circumstances." *Id.* at 171. Tracing to *Carney*, Georgia distinguishes the different privacy interests in "the curtilage of a private residence [from] private commercial property." *Id.* at 170. For this reason, in *Vickers* the automobile exception did not apply because the vehicle was parked in the driveway of the home of one of the defendants. *Id.* at 168-69.

Vickers is particularly apt, as the vehicle search there was on curtilage (like here). But curtilage is not even necessary in Georgia courts. Instead, what is important is that the vehicle is on private, residential property. The Georgia Supreme Court cited both *Carney* and *Coolidge* to hold that this Court's automobile exception "cases do not hold that a search

warrant is *never* needed to search a car." *State v. LeJeune*, 576 S.E.2d 888, 892 (Ga. 2003). "There is an automobile exception to the search warrant requirement, not an exemption." *Id.* at 892. "Otherwise, the Supreme Court of the United States would have held that the police would not, under any circumstances, need to obtain a search warrant for an automobile, provided they have probable cause for the search." *Id.*

Thus, in *LeJeune* the automobile exception did not apply when "the suspect's car was legally parked in his residential parking space, the suspect and his only alleged cohort were not in the vehicle or near it and did not have access to it, and the police seized the automobile without a warrant, placed it on a wrecker and hauled it away to be searched at a later date." *Id.* at 893.

Illinois also distinguishes private residential property from other property where an automobile might be parked. In *Redwood v. Lierman*, 772 N.E.2d 803, 810 (Ill. App. Ct. 2002), an individual filed a 42 U.S.C. § 1983 suit alleging that her Fourth Amendment rights were violated when a deputy "entered [plaintiff's] land, without a warrant and without her consent, and towed the van away."

The Illinois court reasoned that "[o]ne may reasonably infer that the van was sitting within the curtilage of [plaintiff's] home." *Redwood*, 772 N.E.2d at 812. This location was "crucial." *Id.* at 813. "By parking a vehicle in the driveway or yard of one's home, one brings the vehicle within the zone of privacy relating to one's home." *Id.* "In short, one's backyard is a vastly different place, for purposes of the

fourth amendment, than a public street." *Id.* The court effectively held that the automobile exception did not apply to a vehicle parked on curtilage. *Id.*

B. The Seventh, Eighth, Ninth Circuits and Alabama, as well as now Virginia, do not.

The Ninth Circuit holds "that the vehicle exception applies to a search of a vehicle parked on a private driveway." *United States v. Hatley*, 15 F.3d 856, 859 (9th Cir. 1994). In the Ninth Circuit, the automobile exception applies even when—as in *Hatley*—the vehicle is parked on the defendant's residential property. *Id.*

The Ninth Circuit adopted this rule in a case where a motor home was on private, residential driveway. *United States v. Hamilton*, 792 F.2d 837, 842-43 (9th Cir. 1986), *rev'd on other grounds by United States v. Kim*, 105 F.3d 1579, 1580-81 (9th Cir. 1997). In *Hamilton*, the Ninth Circuit asserted that although the motor home was on a "private residential drive" rather than a "public parking lot," the automobile exception still applied. *Id.* at 843 This was because the motor home "was located in a residential driveway, it had easy access to a public road." *Id.*

The Eighth Circuit also applies the automobile exception to vehicles parked on private residential property. *United States v. Blaylock*, 535 F.3d 922, 926-27 (8th Cir. 2008); *see also id.* at 928-29 (Melloy, J., concurring) (suggesting that the court was expressly confronted with the argument that the automobile exception does not apply on private residential property). In *Blaylock*, the vehicle parked on the

defendant's residential driveway was searched. *Id.* at 925. The Eighth Circuit held that this search was subject to the automobile exception. *Id.* at 926-27.

The Eighth Circuit held, essentially, that the lowered expectation of privacy in vehicles overcomes heightened expectations of privacy associated with private, residential property. *Id.*; *see also id.* at 929 (Melloy, J., concurring) (opining that a warrantless search of a vehicle on residential property might be "antithetical" to *Carroll*, but it is permitted under the modern "expansive reading" of the automobile exception).

The Seventh Circuit has joined the Eighth and Ninth Circuits. *See, e.g.*, *United States v. Hines*, 449 F.3d 808, 810-15 (7th Cir. 2006) (automobile exception justified warrantless search of van on driveway to defendant's home).

Alabama "agree[s] with those jurisdictions cited above that have held that the automobile exception applies to vehicles located on private property without any additional exigency requirement." *Harris v. State*, 948 So.2d 583, 597 (Ala. Ct. Crim. App. 2006). The automobile exception applies even if the vehicle is parked in the curtilage of the home. *Id.* at 596-97. Thus, in *Harris*, a search of a vehicle parked behind a mobile home was subject to the automobile exception. *Id.* at 586, 597.

The *Harris* court engaged in a lengthy discussion of lower courts' treatment of Fourth Amendment law. *Id.* at 588-97. Distilled, the court recognized the two justifications—ready mobility and lowered expectations of privacy—for the automobile

exception. *Id.* at 589-90. Citing *Maryland v. Dyson*, the court reasoned the automobile exception has no "public property" element. *Id.* at 590-91. The court concluded that the justifications for the automobile exception do not change with the location of the vehicle, and so a vehicle on private property can be searched on probable cause alone. *Id.* at 597.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 21, 2017

APPENDIX

APPENDIX

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APPENDIX A

SUPREME COURT OF VIRGINIA

Record No. 151277

[Filed September 15, 2016]

RYAN AUSTIN COLLINS	)
	)
v.	)
	)
COMMONWEALTH OF VIRGINIA	)
	)

FROM THE COURT OF APPEALS OF VIRGINIA

PRESENT: Lemons, C.J., Goodwyn, Mims, *McClanahan, Powell, and Kelsey, JJ., and Millette,* S.J.

OPINION BY
CHIEF JUSTICE DONALD W. LEMONS

In this appeal, we consider whether the Court of Appeals erred in affirming the judgment of conviction upon consideration of the trial court's denial of a motion to suppress evidence obtained when police conducted a warrantless search of a stolen motorcycle parked in the driveway of a home where Ryan Austin Collins ("Collins") resided.

I. Facts and Proceedings

Collins was convicted in the Circuit Court of Albemarle County ("trial court") of receiving stolen

property in violation of Code § 18.2-108, and sentenced to three years' imprisonment with all but two months suspended. Prior to trial, Collins moved to suppress the Commonwealth's evidence linking him to a stolen motorcycle. The trial court denied Collins' motion to suppress and held that the police search, although conducted without a warrant, did not violate the Fourth Amendment. The Court of Appeals affirmed the trial court's ruling and Collins now challenges that decision.

A. The Eluding Incidents

On June 4, 2013, Officer Matthew McCall of the Albemarle County Police Department was patrolling on Route 29 near the border of Albemarle County and the City of Charlottesville when he observed a traffic infraction by the operator of an orange and black motorcycle with an extended frame. Officer McCall activated his emergency lights and attempted to stop the motorcycle, but the motorcycle eluded him at a high rate of speed.

Several weeks later, on July 25, 2013, Officer David Rhodes, also of the Albemarle Police Department, was in his police car on the Route 250 Bypass when he observed an orange and black motorcycle traveling at 100 miles per hour in a 55 mph zone. Officer Rhodes engaged his emergency equipment and pursued the motorcycle. Instead of stopping, the motorcyclist increased his speed to at least 140 mph and sped away from the police car. In the interest of safety, Officer Rhodes abandoned his pursuit. However, Officer Rhodes' police car video camera recorded the incident, and police were able to use this footage to obtain a still

photograph of the motorcycle, including its license plates.

The motorcycle was an orange and black Suzuki with chrome accents and a "stretched out" rear wheel, indicating that it had been modified for drag racing. Officer Rhodes could not identify the driver through the darkly tinted helmet, but he observed that the motorcyclist wore blue jeans and "tan Timberland-type work boots." The motorcyclist who eluded Officer McCall two months earlier also wore jeans and "Timberland-type-style boots." After comparing notes and identifying "an awful lot of similarities" between the two eluding incidents, Officers McCall and Rhodes concluded the same motorcyclist had eluded each of them.

When Officer Rhodes entered the motorcycle's license plate number in a police database, he discovered that the tags were "not on file" and had been inactive for several years. The license plate was most recently registered to Eric Jones ("Jones"). In the course of his investigation, Officer Rhodes learned that Jones had sold the motorcycle to Collins before the eluding incidents. Later, at trial, Jones testified that he sold Collins the motorcycle in April 2013 with the caveat that the motorcycle lacked title and was stolen.

> [COMMONWEALTH'S ATTORNEY]: And so do you know why [the motorcycle] didn't have a title?
>
> [ERIC JONES]: Possibly stolen.
>
> Q: Possibly stolen or you knew it was ...
>
> A: Yeah, yeah, it was stolen.

Q: It was stolen[?]

A: Yeah.

....

Q: And did you at some point then sell it to someone?

A: Yeah.

Q: And who did you sell to?

A: Sold it to Ryan.

Q: And who is Ryan? Do you know his last name?

A: Collins.

....

Q: All right, and when you sold it to Ryan Collins, did you tell him about the problem with the motorcycle, about it being stolen?

A: Yeah, I did.

Q: And did you talk to him about the fact that it didn't have a title?

A: Yeah.

B. The Search

On September 10, 2013, Albemarle Police responded to the Department of Motor Vehicles ("DMV") to investigate an unrelated matter[1] involving Collins.

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[1] The record indicates that police arrived at the DMV after receiving a report that Collins was attempting to register a stolen vehicle (a silver Acura sedan). Collins had allegedly forged the title to the Acura in an attempt to reduce the taxes on the vehicle,

Upon hearing Collins' name on the police radio, Officers Rhodes and McCall also responded to the DMV to question Collins since he was a suspect in the motorcycle eluding incidents. Officer McCall advised Collins of his *Miranda* rights, and Collins agreed to speak to the officers. When questioned about the motorcycle, Collins denied knowing anything about it, and told the officers that he "hadn't ridden a motorcycle in months." Meanwhile, Officer Rhodes searched a social media website (Facebook) and found two photographs posted on Collins' Facebook page depicting the motorcycle which appeared to have been involved in the eluding incidents. The photographs showed the orange and black motorcycle parked in a driveway next to the vehicle Collins was attempting to register at the DMV.

Officer Rhodes later testified that upon seeing the photographs of the motorcycle on Collins' Facebook page, he "knew 100% sure that . . . was the same motorcycle that had not stopped for me on the bypass based on looking at it. It was very distinct and I knew, absolutely no question in my mind that was the same motorcycle." However, when the officers showed Collins the Facebook photographs, Collins denied any knowledge of the motorcycle or the house depicted in the photographs.

After the questioning concluded, Collins left the DMV and the officers continued their investigation. Officer Rhodes learned from an informant that the house in the Facebook photograph was located on

---

but the forgery charge was subsequently dismissed and is not relevant to this appeal.

Dellmead Lane in the City of Charlottesville near the border of Albemarle County. Less than half an hour later, Officer Rhodes located the house and parked along the street. From his position on the street, Officer Rhodes could see what appeared to be a motorcycle covered with a white tarp. At trial, Officer Rhodes testified that "a quarter of the wheel [was] sticking out from underneath the cover" and that despite the tarp, he recognized the distinct chrome accents and "stretched out" shape of the motorcycle. Additionally, the location and angle of the partially covered motorcycle matched that of the motorcycle in Collins' Facebook photographs.

Officer Rhodes then walked onto the property, "a car length or two" up the driveway, between the street and the front steps of the house. While standing on the driveway, Officer Rhodes uncovered the motorcycle and confirmed that it appeared to be the same orange and black Suzuki that had eluded him on July 25, 2013. He then recorded the motorcycle's vehicle identification number or "VIN." A computer search of the VIN revealed the motorcycle had been "stolen out of New York" several years before. After gathering this information, Officer Rhodes re-covered the motorcycle, left the property, and returned to his police car to conduct surveillance and wait for Collins.

Shortly thereafter, a vehicle dropped off Collins at the Dellmead Lane residence. Officer Rhodes returned to the house and knocked on the door, which Collins answered. Although it was "over 90 [degrees] that day," Collins came to the door dressed in jeans, a sweatshirt, and Timberland-style boots. Officer Rhodes later testified that "at the DMV 30 minutes

prior" Collins had been wearing "shorts and flip flops and a t-shirt." When asked about the motorcycle, Collins initially said he "didn't know anything about it." He then told Officer Rhodes it belonged to a friend. Eventually, Collins admitted that he purchased the motorcycle, without a title, from Eric Jones. At trial during direct examination by the Commonwealth's Attorney, Officer Rhodes recounted his conversation with Collins:

> [COMMONWEALTH'S ATTORNEY]: [T]ell the judge, please, when [Collins] comes to the door what happened next?
>
> [OFFICER RHODES]: I asked him, I said do you mind if I speak with you, and he said sure. We came. . . outside, and I started inquiring about the motorcycle. I asked him [if] he knew about this motorcycle, [and] he told me he didn't know anything about it, it was a friend's. . . . [Collins] then told me "well I did ride it over, bring it over from my mom's, over in Northfield over to Dellmead Avenue, but that had been a while and I don't ever drive it, because I don't have a motorcycle license."
>
> ....
>
> Q: Did he tell you then, ultimately, whose motorcycle it was?
>
> A: He told me it was ... it was his. He told me ultimately he had bought it, he had paid $3,500 to Eric Jones for the motorcycle, and that's where the tag comes back into play ... which corroborated that story that that tag had involvement with Eric Jones....

> Q: [Collins] bought the motorcycle from Eric Jones?
>
> A: [Yes, t]he motorcycle from Eric Jones, and [Collins] had paid $3,500 for it, and there was no title for the motorcycle.

Officer Rhodes then arrested Collins for receiving stolen property. As he searched Collins incident to the arrest, Officer Rhodes discovered a key to the motorcycle in Collins' pocket.

C. Collins' Motion to Suppress

A grand jury indicted Collins for possession of stolen property, in violation of Code § 18.2-108. Collins moved to suppress the evidence obtained by Officer Rhodes on Fourth Amendment grounds. Collins argued:

> What we're really talking about here is trespassing on real property. Trespassing on the curtilage of a home for the purposes of doing investigation. I would conclude that Officer Rhodes violated the law in trespassing on private property. It was for the purpose of the search. He has no probable cause to do so. He certainly had no exigent circumstances. And any information that he gained as a result of that illegal trespass including [the] VIN number [should be suppressed].

The Commonwealth responded:

> Your Honor, while there is a Constitutional Fourth Amendment action against a [un]reasonable search and seizure, Mr. Collins'

> arguments are misguided. The search that Officer Rhodes conducted of the orange motorcycle [on] September 10th, 2013 was reasonable and lawful. The Supreme Court has long recognized an automobile exception to the traditional requirement of probable cause in a warrant. In *Carroll v. United States*, the Court concluded that automobiles were readably mobile and therefore eas[ily] moved from a jurisdiction. Probable cause alone is enough to justify a search and a warrant is unnecessary. The Supreme Court confirmed this in *Maryland v. Dyson* ...where the [Court] explicitly ruled that warrantless search of a vehicle [was] lawful within the Fourth Amendment.

The Commonwealth's Attorney further argued that Officer Rhodes had probable cause because he had seen on Collins' Facebook page, a photograph of the uncovered motorcycle parked in the same spot in front of the house. Additionally, the motorcycle had chrome wheels and an extended sway arm[2] which made it longer than a standard motorcycle. In response, Collins argued that the automobile exception was inapplicable since the motorcycle was parked and located on private property.

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[2] An extended sway arm, or swingarm, refers to the part of a sport motorcycle to which the rear wheel is attached, making it project further behind the operator's seat than normal so as to give the motorcycle a longer overall wheelbase and lower profile. Frequently, it is also used to equip a sport motorcycle with a wider rear tire.

> Your Honor, the automobile exception to my understanding is the search of the automobile not a search for an automobile... [The] [a]utomobile exception was created for officers on the street when they stop somebody and they know there is going to be maybe contraband in the vehicle and it's an exception to a warrant requirement. That exception does not apply in this case. That vehicle was parked in a private driveway.

After hearing argument from both parties, the trial court ruled on Collins' motion. The trial court held that Officer Rhodes did not violate Collins' Fourth Amendment rights.

> So the Court finds that ... where this is in an area where it is exposed to the public where the officer asked Mr. Collins about the motorcycle and [Collins] indicated he didn't know anything about it, where it's in the exact same location [as the Facebook photograph], where it matches the officer's description ... and where it has the chrome wheels, the Court finds that there was probable cause for the search and therefore it was not an unreasonable governmental intrusion. The Court is going to deny the motion to suppress.

A bench trial ensued, and the trial court convicted Collins of receiving stolen property.

D. Court of Appeals Opinion

Collins appealed his conviction to the Court of Appeals. The Court of Appeals affirmed Collins' conviction in a published opinion. *Collins v.*

Commonwealth, 65 Va. App. 37, 773 S.E.2d 618 (2015). The Court of Appeals held that Officer Rhodes "unquestionably had probable cause to believe the motorcycle was the one from the eluding incident." *Id.* at 44, 773 S.E.2d at 622. The Court of Appeals also concluded that Officer Rhodes' warrantless search was justified under the exigent circumstances exception to the Fourth Amendment's warrant requirement. *Id.* at 46-48, 773 S.E.2d at 623-24. The Court of Appeals declined to address the automobile exception on the basis that other "exigencies existed aside from the inherent mobility of the motorcycle." *Id.* at 48 n.4, 773 S.E.2d at 624 n.4. Upon petition we granted Collins' appeal on the following assignment of error:

> The trial court erred in denying Collins' motion to suppress the evidence related to the motorcycle because the officer illegally trespassed onto private property for [the] purpose of conducting a search in violation of his Fourth Amendment right to be free of unreasonable searches and seizures. The Court of Appeals of Virginia erred in upholding the judgment of the trial court and finding that the officer acted lawfully under the Fourth Amendment in entering the property and searching the motorcycle.

II. Analysis

A. Standard of Review

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A defendant's claim

that evidence was seized in violation of the Fourth Amendment presents mixed questions of law and fact that this Court reviews de novo on appeal. *Jones v. Commonwealth*, 277 Va. 171, 177, 670 S.E.2d 727, 731 (2009). The Court gives deference to the trial court's factual findings, but will independently determine whether the manner in which evidence was obtained meets the requirements of the Fourth Amendment. *Id.* Moreover, "[t]he defendant bears the burden of establishing that the denial of his suppression motion was reversible error." *Glenn v. Commonwealth*, 275 Va. 123, 130, 654 S.E.2d 910, 913 (2008).

B. Automobile Exception to the Fourth Amendment Warrant Requirement

Before the Court of Appeals and before this Court, Collins argued that Officer Rhodes trespassed when he walked up the driveway of Collins' residence without permission or a search warrant. Collins also argued that Officer Rhodes conducted a warrantless, unconstitutional search when he removed the motorcycle tarp to reveal its VIN–evidence which ultimately confirmed that the motorcycle was stolen. While the Court of Appeals analyzed the issue based upon probable cause and exigent circumstances, this case is more appropriately resolved under the automobile exception.

In this case, Officer Rhodes lacked a search warrant when he walked up Collins' driveway and searched the motorcycle by removing the tarp and locating the VIN. "Warrantless searches, of course, are per se unreasonable, subject to a few well-defined exceptions." *Abell v. Commonwealth*, 221 Va. 607, 612, 272 S.E.2d 204, 207 (1980); *see also Katz v. United States*, 389

U.S. 347, 357 (1967). These narrowly delineated exceptions include: consent,[3] search incident to a lawful arrest,[4] plain view,[5] and exigent circumstances.[6] We have recognized several common examples of exigent circumstances such as hot pursuit, the imminent destruction of evidence, and the possibility of danger to others. *Verez v. Commonwealth*, 230 Va. 405, 410, 337 S.E.2d 749, 752-53 (1985). In this case, however, neither the Commonwealth nor the trial court invoked the exigent circumstances exception. Although the Court of Appeals based its decision on exigent circumstances, we do not find it necessary to independently assess whether exigent circumstances existed here. Rather, the facts of this case are more

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[3] *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) ("It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.").

[4] *See Morris v. Commonwealth*, 208 Va. 331, 334, 157 S.E.2d 191, 194 (1967) ("[W]here incident to a valid arrest," officers may lawfully search and seize personal effects without a search warrant.") (citing *United States v. Jeffers*, 342 U.S. 48, 51 (1951)).

[5] *See Jones v. Commonwealth*, 279 Va. 665, 672, 691 S.E.2d 801, 804 (2010) (under the "plain view" doctrine, officers who are lawfully present on a property but who lack a search warrant may nonetheless seize items which are in plain view and immediately incriminating).

[6] If there is both an exigency and sufficient probable cause to believe a crime has occurred, police may conduct a lawful search even absent a warrant. *See Verez v. Commonwealth*, 230 Va. 405, 410, 337 S.E.2d 749, 752-53 (1985) (citing *Payton v. New York*, 445 U.S. 573 (1980)).

properly addressed by a different exception to the warrant requirement: the automobile exception.

The origins of the automobile exception reflect the inherent exigency associated with the readily mobile nature of vehicles. *See Pennsylvania v. Labron*, 518 U.S. 938. 940 (1996) ("Our first cases establishing the automobile exception to the Fourth Amendment's warrant requirement were based on the automobile's ready mobility, an exigency sufficient to excuse failure to obtain a search warrant once probable cause to conduct the search is clear."). Nonetheless, the Supreme Court of the United States has expressly held that the automobile exception is a distinct and independent exception to the warrant requirement.

> The Fourth Amendment generally requires police to secure a warrant before conducting a search. As we recognized nearly 75 years ago in *Carroll v. United States*, 267 U.S. 132, 153 (1925), there is an exception to this requirement for searches of vehicles. And under our established precedent, the "automobile exception" has no separate exigency requirement. We made this clear in *United States v. Ross*, 456 U.S. 798, 809 (1982), when we said that in cases where there was probable cause to search a vehicle "a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not been actually obtained."

Maryland v. Dyson, 527 U.S. 465, 466-67 (1999) (internal citations omitted). The Supreme Court has articulated a simple, bright-line test for the automobile exception: "[i]f a car is readily mobile and probable

cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more." *Id.* at 467 (citing *Labron*, 518 U.S. at 940). Applying that test to this case, we hold that Officer Rhodes' warrantless search of the motorcycle was justified under the automobile exception to the warrant requirement of the Fourth Amendment.

1. Officer Rhodes Had Probable Cause to Believe the Motorcycle Was Contraband

The facts of this case supported a finding of probable cause sufficient to allow Officer Rhodes to search the motorcycle under the automobile exception. As a result of his prior investigation, Officer Rhodes had several reasons to believe the motorcycle was contraband. Eric Jones had informed Officer Rhodes that he sold Collins the motorcycle with the warning that it was stolen. Therefore, when he arrived at the Dellmead Lane residence on September 25, 2013, Officer Rhodes already suspected that the motorcycle which had eluded him and Officer McCall was stolen property. The motorcycle was in plain view from the street and Officer Rhodes immediately recognized its distinct features. In denying Collins' motion to suppress, the trial court found that, despite the tarp, the motorcycle's unique "stretched out" frame and chrome wheels were visible to Officer Rhodes from his lawful position on the street. The location and angle of the partially covered motorcycle matched that of the uncovered motorcycle in Collins' Facebook photograph. Accordingly, both the trial court and the Court of Appeals properly held that Officer Rhodes had probable cause to search the motorcycle.

2. Automobile Exception Applies Even When Vehicle is Not "Immediately Mobile"

On brief Collins argued that "no reasonable law enforcement officer could claim that, under these facts, the motorcycle was in imminent danger of being destroyed." (Opening Br. at 30). He further argued:

> Had Collins emerged from the residence, removed the tarp and attempted to drive the motorcycle away, Officer Rhodes would have had clear evidence linking Collins to the motorcycle and could have immediately approached him to further investigate the suspected incident of eluding.

(Opening Br. at 28). Collins contends that because Officer Rhodes was conducting surveillance of the residence, Collins could not have removed the tarp, started the motorcycle, and fled the premises without first being apprehended. He suggests that Officer Rhodes could have stopped the motorcycle by blocking the driveway with his police car.

These arguments both defy common sense and misapply the automobile exception, which is a bright-line test. The suggestion that Officer Rhodes could have "immediately approached [Collins] to further investigate" conveniently ignores the fact that this motorcycle had twice eluded police at high speeds. And, since he had questioned Collins about the motorcycle earlier that same day, Officer Rhodes had good reason to suspect that Collins would return from

the DMV and speed away on the motorcycle in order to hide it and potentially remove the VIN.[7]

Moreover, "[a] vehicle's inherent mobility—not the probability that it might actually be set in motion—is the foundation of the automobile exception's mobility rationale." *United States v. Smith*, 456 Fed. Appx. 200, 209 (4th Cir. 2011). The Fourth Circuit in *Smith* held that:

> [T]he mobility rationale does not turn on case-by-case determinations by agents in the field regarding either the probability that a vehicle could be mobilized or the speed with which movement could be achieved.

Id. (citing *United States v. Navas*, 597 F.3d 492, 498-500 (2d Cir. 2010) (under the automobile exception, police were permitted to search a trailer even though it

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[7] Regardless of whether it was "immediately mobile" at the precise moment of the search, the motorcycle and its rider nonetheless posed a significant flight risk. For example, in the short time between his DMV encounter with police and his interaction with Officer Rhodes on the doorstep of the Dellmead Lane residence, Collins changed from flip flops and shorts into boots, jeans, and a sweatshirt. Generally, a Fourth Amendment analysis is not a retrospective review and we are only concerned with those "facts known to the officer at the time" [of the search]. *Sidney v. Commonwealth*, 280 Va. 517, 525, 702 S.E.2d 124, 129 (2010). However, as the Court of Appeals noted below, the fact that Collins had changed into motorcycle clothes and had the key in his pocket "further speak[s] to the reasonableness of Officer Rhodes' belief that ... [Collins] not only possessed an interest in, but also the ability and probable intention to move the motorcycle out of the reach of law enforcement." *Collins*, 65 Va. App. at 47, 773 S.E.2d at 623.

was unattached from the tractor trailer cab)). Furthermore, the Supreme Court has expressly held that individuals enjoy a "lesser degree of protection" with respect to their privacy interests in automobiles. *California v. Carney*, 471 U.S. 386, 390 (1985); *see also Missouri v. McNeely*, 569 U.S. ___, 133 S. Ct. 1552, 1565 (2013) ("[P]eople are accorded less privacy in automobiles because of the compelling governmental need for regulation.") (citing *Carney*, 471 U.S. at 392).

> [A]lthough ready mobility alone was perhaps the original justification for the vehicle exception, our later cases have made clear that ready mobility is not the only basis for the exception ... Even in cases where an automobile was not immediately mobile, the lesser expectation of privacy resulting from its use as a readily mobile vehicle justified application of the vehicular exception.

Carney, 471 U.S. at 391 (citing *Cady v. Dombrowski*, 413 U.S. 433, 441-42 (1973) (recognizing the automobile exception even in cases where the "possibilities of the vehicle's being removed or evidence in it destroyed were remote, if not nonexistent")).

Consequently, in this case, we need not decide whether the motorcycle was immediately mobile at the precise moment of the search. The bright-line test does not require us to hypothesize whether it would have been technically possible for Collins to uncover the motorcycle, start the engine, and flee from Officer Rhodes. *See McCary v. Commonwealth*, 228 Va. 219, 228, 321 S.E.2d 637, 642 (1984) (the automobile exception applies "even if there is no risk of removal of the vehicle or its contents"). The mere fact that the

stolen motorcycle was "clearly operational and therefore readily movable" governs our decision. *United States v. Brookins*, 345 F.3d 231, 237 (4th Cir. 2003).

3. Automobile Exception May Apply to Vehicles Parked on Private Property

During the suppression hearing, Collins argued that the automobile exception does not apply to a vehicle parked in a private driveway. The trial court did not consider this question, but the Court of Appeals addressed the issue and appeared to agree with Collins. In a footnote, the Court of Appeals implied that the automobile exception does not apply to the search of a vehicle on private property.[8] *See Collins v. Commonwealth*, 65 Va. App. at 48 n.4, 773 S.E.2d at

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[8] Footnote 4 of the Court of Appeals' opinion stated:

> We note that the United States Supreme Court has suggested that a search of a vehicle on private property requires more than mere mobility, as is generally sufficient under the automobile exception. *Coolidge v. New Hampshire*, 403 U.S. 443, 460 (1971) (plurality opinion) (stating that "'exigent circumstances' justify the warrantless search of 'an automobile stopped on the highway,' where there is probable cause, because the car is 'movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained'" (quoting *Chambers v. Maroney*, 399 U.S. 42, 51 (1970))); *see also California v. Carney*, 471 U.S. 386, 392-93 (1985) (discussing the automobile exception's relevance "[w]hen a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes . . ." (emphasis added)). Here, we need not rely on the automobile exception, for exigencies existed aside from the inherent mobility of the motorcycle.

624 n.4. (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 460 (1971) (plurality opinion) and *California v. Carney*, 471 U.S. 386, 392-93 (1985)). However, the Court of Appeals misconstrued the automobile exception when it unnecessarily restricted its application to vehicles stopped on public highways. The Supreme Court has never limited the automobile exception such that it would not apply to vehicles parked on private property. Our Court has held that there is no reasonable expectation of privacy in a vehicle parked on private property yet exposed to public view. *See Thims v. Commonwealth*, 218 Va. 85, 93, 235 S.E.2d 443, 447 (1977).

The Court of Appeals cited *Coolidge v. New Hampshire* and *California v. Carney* but those cases did not distinguish the automobile exception on a public roadway versus on a private driveway. Instead, the Supreme Court in *Carney* extended the automobile exception to a "fully mobile motor home" parked in a lot[9] and held that no search warrant was necessary so long as police had probable cause to believe the vehicle contained contraband. 471 U.S. at 393. The Court focused on the mobile characteristics rather than the exact location of the motor home. *Id.*

> First, the vehicle is obviously readily mobile by the turn of an ignition key, if not actually moving. Second, there is a reduced expectation of privacy stemming from its use as a licensed

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[9] The Supreme Court's opinion in *California v. Carney* did not specify whether the San Diego parking lot where the defendant had parked his "fully mobile motor home" was a public facility or a privately owned lot. 471 U.S. at 388.

> motor vehicle subject to a range of police regulation inapplicable to a fixed dwelling. At least in these circumstances, the overriding societal interests in effective law enforcement justify an immediate search before the vehicle and its occupants become unavailable.

Id.

Similarly, the Court of Appeals' reliance on *Coolidge* is misguided.

> Although heightened privacy interests may be triggered when a vehicle is encountered on private property, the *Coolidge* plurality opinion cannot be fairly read to create a bright-line rule precluding warrantless searches on private property under all circumstances.

Brookins, 345 F.3d at 237. *Brookins* involved a motion to suppress narcotics evidence discovered when police, without a warrant, searched a car which was parked on a private driveway in Suffolk, Virginia. *Id.* In that highly analogous case, the United States Court of Appeals for the Fourth Circuit rejected the district court's application of a "bright-line rule, whereby the automobile exception may never apply when a vehicle is stationed on private, residential property." *Id.* In *Brookins*, an individual suspected of selling crack cocaine "fled the scene in [a] Ford Expedition." *Id.* at 234. Police later observed the Ford Expedition parked in the driveway of a private residence, and they walked onto the property to conduct a search which revealed drug paraphernalia. *Id.*

Just as the police in *Brookins* discovered contraband when they searched the Ford Expedition on private

property, Officer Rhodes also discovered contraband when he searched the motorcycle parked at Collins' residence. By lifting the tarp and discovering the VIN, Officer Rhodes verified that the motorcycle was indeed stolen, and therefore constituted contraband. Accordingly, we hold that Officer Rhodes' search of the motorcycle was permissible under the automobile exception.

The dissent contends that "Officer Rhodes did not search the motorcycle, he searched the tarp." This argument ignores the fact that Officer Rhodes' stated purpose in lifting the tarp was not to determine whether the tarp covered a motorcycle, but rather to verify the identity of the partially covered motorcycle and record its VIN. At the suppression hearing, Officer Rhodes testified that "to determine if this was the motorcycle that I was, in fact, looking for . . . . I removed the cover then I ran the tag on that motorcycle . . . . I got the VIN number off the motorcycle and then ran that as well." The dissent plainly acknowledges that "the shape and contours of the object were visible through the tarp and suggested the object it covered was an extended motorcycle . . . . the lower half of the front wheel of the motorcycle was exposed to view outside the tarp." Consequently, Officer Rhodes knew that the object being searched was a motorcycle partially covered by a tarp.

The dissent argues that the Commonwealth characterized the search as one of the tarp. However, the very first sentence uttered by the Commonwealth's Attorney during the suppression hearing described Officer Rhodes' actions as a search of the motorcycle.

> The search that Officer Rhodes conducted of the orange motorcycle September 10th, 2013 was reasonable and lawful. The Supreme Court has long recognized an automobile exception to the traditional requirement of probable cause [and] a warrant.

At trial and on appeal Collins has never specifically challenged Officer Rhodes' uncovering of the tarp as a distinct search. Instead, Collins has consistently characterized Officer Rhodes' conduct as an "illegal trespass" which revealed the motorcycle's VIN. In his brief to this Court Collins maintained that:

> Officer Rhodes trespassed onto private property. . . . , physically removed the tarp from the motorcycle[,] and *conducted a search of the motorcycle*.

(Opening Br. at 13-14) (emphasis added). Additionally, the defendant's own characterization of the issue is found in his argument that "[t]he Court of Appeals erred in holding that exigent circumstances justified the officer's warrantless entry onto the property and *the search of the motorcycle*." *Id.* at 24 (emphasis added).

The dissent relies on *New York v. Class*, 475 U.S. 106 (1986). In that case, the United States Supreme Court considered whether a police officer violated the Fourth Amendment when, without a warrant, he searched a car by moving paperwork on the dashboard to verify a VIN.[10] The Court in *Class* held that:

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[10] "In *Class*, the Supreme Court determined that in light of the important role VIN's play in the pervasive governmental

> We think it makes no difference that the papers in respondent's car obscured the VIN from the plain view of the officer. We have recently emphasized that efforts to restrict access to an area do not generate a reasonable expectation of privacy where none would otherwise exist.

Id. at 114 (citing *Oliver v. United States*, 466 U.S. 170, 182-84 (1984)). Just like the police officer in *Class* who removed papers from the dashboard for the purpose of obtaining the VIN, here Officer Rhodes removed the tarp in order to reveal the VIN on a motorcycle he believed to be linked to criminal activity. The defendant in *Class* challenged the search of the car, not the search of the papers on the dashboard. *Id.* Likewise, in this case, Collins challenged the search of the motorcycle, not the search of the tarp.[11]

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regulation of automobiles, a 'motorist must surely expect that . . . regulation will on occasion require the State to determine the VIN of his or her vehicle.' [475 U.S.] at 113. This fact, coupled with the diminished expectation of privacy inherent in automobiles generally, led the Supreme Court to hold that there is no reasonable expectation of privacy in a VIN." *State v. Geissler*, 11 P.3d 1120, 1122 (Idaho Ct. App. 2000) (citing *Class*, 475 U.S. at 114).

[11] When a police officer lifts a tarp and reveals contraband, courts typically describe the search as a search of the contraband rather than a search of the tarp itself. Several cases from other jurisdictions help to illustrate this point.

In *State v. Allen*, 166 P.3d 111 (Ariz. Ct. App. 2007), a police officer investigating a hitand-run involving a red car came upon a red coupe that was partially covered by a tarp. The officer lifted the cover and observed damage to the vehicle consistent with the accident. *Id.* at 112. The defendant later moved to suppress the

C. Right Result for a Different Reason

"An appellate court may properly affirm a judgment appealed from where the court from which the appeal was taken reached the correct result but assigned a different reason for its holding." *Rives v. Commonwealth*, 284 Va. 1, 2, 726 S.E.2d 248, 250 (2012). The "right result for the wrong [or different] reason" doctrine is only applicable where the "right reason" can be fully supported by the evidence in the

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evidence of the damage to his vehicle. *Id.* The Arizona Court of Appeals held that lifting the car cover did not constitute an unlawful *search of the vehicle* under the Fourth Amendment. "The lifting of the car cover to view the exterior of the vehicle . . . did not invade any reasonable expectation of privacy." *Id.* at 117.

Similarly, in *State v. Tegland*, 344 P.3d 63 (Or. Ct. App. 2015), a homeless defendant was living in a shelter he built using a grocery cart, a wooden pallet and multiple tarps. *Id.* at 65. Police lifted up the tarp and discovered methamphetamine paraphernalia. *Id.* The trial court denied the defendant's motion to suppress in which he challenged the search of his "residence." *Id.* at 65-66. The Oregon Court of Appeals affirmed, characterizing the search as a lawful search of the interior of the defendant's makeshift residence–not a search of the tarp itself. *Id.* at 68-69.

See also United States v. Rosado, 1994 U.S. Dist. LEXIS 8617, at *12 (S.D.N.Y. June 27, 1994) (unpublished) (citing *New York v. Class*, 475 U.S. at 114) ("The placement of the tarp on defendant's car was insufficient to create a privacy interest in the license plate number, which like the VIN, is an identifying characteristic needed for the government to regulate and identify automobiles."); *State v. Emmons*, 386 N.E.2d 838, 842, 844-45 (Ohio Ct. App. 1978) (under the automobile exception set forth in *Carroll v. United States*, detectives were justified in "examining movable personal property" by lifting tarps covering two stolen motorcycles parked in a private driveway despite having no search warrant or consent to search).

record and where the development of additional facts is unnecessary to support it. *Perry v. Commonwealth*, 280 Va. 572, 579-80, 701 S.E.2d 431, 435-36 (2010). Recently, in *Ricks v. Commonwealth*, 290 Va. 470, 480, 778 S.E.2d 332, 336-37 (2015), we affirmed a decision by the Court of Appeals to reverse a defendant's conviction even though we articulated an entirely different rationale.

Here, the facts necessary to resolve this case under the automobile exception to the warrant requirement of the Fourth Amendment were established in the record before the trial court. Therefore, Officer Rhodes' search of the motorcycle was justified and we will affirm the judgment of conviction as "the right result for a different reason."

III. Conclusion

For the reasons stated, we will affirm the judgment of the Court of Appeals.

Affirmed.

JUSTICE MIMS, dissenting.

The majority holds that Officer Rhodes' search was permitted under the automobile exception to the Fourth Amendment's warrant requirement. However, Officer Rhodes did not search an automobile, he searched a tarp. I therefore must respectfully dissent.

The majority accurately recounts the relevant facts. Officer Rhodes went to a house shown in Collins'

Facebook photograph.[1] There, Officer Rhodes saw from the public street an object covered by a white tarp on the paved driveway running alongside the front yard. The shape and contours of the object were visible through the tarp and suggested that the object it covered was an extended motorcycle similar to the one he had attempted to stop a few weeks earlier. The lower half of the front wheel of the motorcycle was exposed to view outside the tarp and its features were also similar to those of the motorcycle he had attempted to stop. Officer Rhodes then entered the driveway, approached the motorcycle parked beside the house, removed the tarp, and exposed the vehicle identification number. Using the vehicle identification number, Officer Rhodes learned that the motorcycle was stolen and arrested Collins.

The majority holds that Officer Rhodes' warrantless search was permitted by the automobile exception. However, the automobile exception permits a warrantless search *of* a vehicle, not *for* a vehicle. *See Maryland v. Dyson*, 527 U.S. 465, 466 (1999) ("The Fourth Amendment generally requires police to secure a warrant before conducting a search. As we recognized nearly 75 years ago . . . , there is an exception to this requirement for searches *of* vehicles." (internal citations omitted) (emphasis added)). As the majority notes, the automobile exception, distilled to its essence, provides that "[i]f a car is readily mobile and probable cause exists to believe it *contains* contraband, the Fourth Amendment . . . permits police to search the

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[1] The house was later established to be the home of Kandace Beach, Collins' girlfriend and the mother of his child, where Collins occasionally stayed overnight.

vehicle without more." *Id.* at 467 (internal quotation marks omitted) (ellipsis in original) (emphasis added). The motorcycle did not *contain* contraband, it *was* contraband; Officer Rhodes did not search the motorcycle, he searched the tarp.

Although the majority repeatedly says that Officer Rhodes "searched the motorcycle" and merely "remov[ed]" or "lift[ed]" the tarp, *supra* at 9, 16, the tarp was the only thing searched. Searching the tarp revealed the motorcycle. Once the motorcycle was exposed by searching the tarp, examining the motorcycle's vehicle identification number was not a search because vehicle identification numbers are not protected by the Fourth Amendment. *New York v. Class*, 475 U.S. 106, 113-14 (1986) (holding that there is no reasonable expectation of privacy in a vehicle identification number, which is required by law to be in public view while the vehicle is being operated). "The exterior of a car, of course, is thrust into the public eye, and thus to examine it does not constitute a 'search.'" *Id.* at 114.[2] In short, it does not matter that the motorcycle is a vehicle, because it was not searched. Accordingly, the automobile exception to the warrant requirement does not apply here.[3]

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[2] The vehicle in *Class* had been stopped for being driven "above the speed limit [and] with a cracked windshield." 475 U.S. at 108. Unlike the vehicle in *Class*, the motorcycle here was parked in a private driveway rather than being operated on a public highway, and its exterior was not "thrust into the public eye" but was concealed from the public eye–by the tarp.

[3] Although the majority opinion says Collins did not challenge the search of the tarp, that statement is contradicted by the record. At the hearing on Collins' motion to suppress, the Commonwealth

There is no question that Officer Rhodes was entitled to observe whatever he could see from the street. *California v. Ciraolo*, 476 U.S. 207, 213 (1986) ("The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on

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characterized the search as one of the tarp: "The removal of the tarp covering the motorcycle was lawful under the [Fourth] Amendment and the information gained from the removal should not be suppressed." Collins responded seconds later by arguing that "the automobile exception . . . is the search *of* the automobile not a search *for* an automobile." (Emphases added.)

The distinction is readily apparent. If a police officer lawfully stops a known felon and sees a pistol-shaped bulge in the pocket of a coat he is carrying and the grip of a pistol protrudes from the opening, the search that will ensue is one *of the coat*, not *of the pistol*, even if the search of the coat is *for* the pistol and a purpose of the search is to obtain the pistol's serial number, which replicates an automobile's vehicle identification number in this example. 18 U.S.C. § 923(i) (requiring all licensed firearms manufacturers or importers to engrave or cast a serial number on the receiver or frame of a firearm); 27 C.F.R. § 478.92(a)(1)(i) (specifying visibility requirements for such serial numbers); *see also New Jersey v. Harris*, 50 A.3d 15, 28-29 (N.J. 2012) (holding that there is no reasonable expectation of privacy in a firearm's serial number when the firearm is exposed to public view).

As the Supreme Court has held, actions taken to expose a serial number or other identifying mark that is not already in plain view constitute a search. *Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987) (holding that moving stereo equipment to obtain its serial number constituted a search). There is a "distinction between looking at a suspicious object in plain view and moving it even a few inches [that] is much more than trivial for purposes of the Fourth Amendment." *Id.* at 325 (internal quotation marks omitted). That is especially true where, as here, an independent object is moved to expose the serial number or other identifying mark.

public thoroughfares.") He may even have been entitled to enter the driveway to get a closer look at the tarp or the part of the motorcycle already exposed to public view, perhaps to confirm his impression that the shape, contours, and wheel matched those of the motorcycle that had previously eluded him. *Oliver v. United States*, 466 U.S. 170, 180 (1984) (differentiating open fields, for which officers need no warrant to enter and observe what they see with their naked eyes, from curtilage).[4] But he was not entitled to search the tarp

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[4] Based on the photograph taken by Officer Rhodes and admitted into evidence at trial, the driveway is the only route by which to travel from the street to the front porch and front door without walking on the lawn. However, the driveway extends past the house, running alongside it after the front yard ends, and continues well beyond the front porch and front door to allow vehicles to be parked beside the house. Officer Rhodes' photograph shows that the covered motorcycle was parked in this part of the driveway, beyond the front perimeter wall of the house, past the front porch and front door, and that it was merely feet–no more than the width of the sport-utility vehicle parked in front of it–from the side perimeter wall of the house.

The law "regard[s] the area immediately surrounding and associated with the home--what our cases call the curtilage–as part of the home itself for Fourth Amendment purposes. . . . This area around the home is intimately linked to the home, both physically and psychologically, and is where privacy expectations are most heightened." *Florida v. Jardines*, 133 S. Ct. 1409, 1414-15 (2013) (internal quotation marks omitted).

I do not address the question of whether the part of the driveway where the motorcycle was parked, within feet of the side of a house in a residential suburban neighborhood and as immediately surrounding the home as possible without being inside it, was curtilage or open field for Fourth Amendment purposes. Searching the tarp without a warrant was unconstitutional even if the area where the motorcycle was parked is considered to be open field. *Husband v. Bryan*, 946 F.2d 27, 29

to reveal what it covered without a warrant.

Accordingly, I dissent from the majority's opinion that Officer Rhodes' warrantless search was permitted by the automobile exception to the Fourth Amendment's warrant requirement.

(5th Cir. 1991) (noting that the open fields doctrine permits observation only); *see also United States v. Dunn*, 480 U.S. 294, 304 (1987) ("[T]here is no constitutional difference between police *observations* conducted while in a public place and while standing in the open fields." (emphasis added)); *Allinder v. Ohio*, 808 F.2d 1180, 1185 (6th Cir. 1987) (noting that the doctrine allows officers to enter open fields but not to search personal effects found there).

APPENDIX B

COURT OF APPEALS OF VIRGINIA

Record No. 1096-14-2

[Filed July 21, 2015]

RYAN AUSTIN COLLINS	)
	)
v.	)
	)
COMMONWEALTH OF VIRGINIA	)
	)

FROM THE CIRCUIT COURT OF
ALBEMARLE COUNTY
Cheryl V. Higgins, Judge

Charles L. Weber, Jr., for appellant.

Michael T. Judge, Senior Assistant Attorney General (Mark R. Herring, Attorney General, on brief), for appellee.

Present: Chief Judge Huff, Judges Beales and AtLee
Argued at Richmond, Virginia

OPINION BY
JUDGE RICHARD Y. ATLEE, JR.

On May 7, 2014, a judge convicted Ryan Austin Collins (hereinafter "appellant") for receiving stolen goods. The court sentenced him to three years in prison, with all but two months suspended. Appellant argues that the trial court erred in two respects. First,

appellant contends that the trial court erred in denying his motion to suppress evidence related to the stolen motorcycle because law enforcement obtained the evidence through an illegal search, in violation of the Fourth Amendment. Second, appellant submits that the trial court erred in denying his motion to strike because the evidence was insufficient as a matter of law to prove appellant knew the motorcycle was stolen. For the reasons that follow, we find no error and affirm.

I. Facts of the Case

"On appellate review, we are bound by the familiar principle that 'we must consider the evidence and all reasonable inferences fairly deducible therefrom in the light most favorable to the Commonwealth, the prevailing party below.'" Robinson v. Commonwealth, 273 Va. 26, 30, 639 S.E.2d 217, 219 (2007) (quoting Rose v. Commonwealth, 270 Va. 3, 6, 613 S.E.2d 454, 455 (2005)). So viewed, the evidence is as follows.

On July 25, 2013, Albemarle County Police Officer Rhodes was on patrol when he saw a motorcycle rapidly approaching his vehicle from behind. Officer Rhodes's radar indicated the motorcycle was going 100 miles per hour. The motorcycle passed Officer Rhodes, at which point he activated his lights and attempted to initiate a stop. The motorcycle then raced off at a speed exceeding 140 miles per hour. Officer Rhodes initially pursued the driver, but ultimately abandoned the pursuit due to the driver's recklessness. This same motorcycle was associated with an earlier eluding incident involving a different police officer, Officer McCall.

Officer Rhodes taped the July 2013 eluding incident on a video recording device in his vehicle, and recorded the motorcycle's license plate number. The plates came back as inactive, and had been so for several years. The plates previously had been associated with Eric Jones (hereinafter "Jones"). Officer Rhodes learned from Jones that he had sold the motorcycle prior to the eluding incident, and another source linked appellant to the motorcycle. Through another officer who had access to appellant's Facebook page, Officer Rhodes obtained two images. The first depicted a residence with several vehicles parked in the driveway and a silver Acura parked in front of the house. The other depicted an orange and black motorcycle parked between a silver Toyota 4-Runner and a black sedan, beside a low brick wall framing the driveway at the same residence. Officer Rhodes recognized the motorcycle as the one he attempted to stop during the July 2013 eluding incident and identified a number of custom features on the bike. Specifically, it had chrome accents and had been "stretched out," meaning a rear piece was added to the motorcycle, a modification generally indicating the motorcycle was intended for drag racing.

On September 10, 2013, appellant was at the DMV to register a silver Acura. Officer Rhodes heard appellant's name on the police radio because other officers were investigating the vehicle. Officer Rhodes went to speak with appellant and showed him the photos from his Facebook page. Appellant denied knowing anything regarding the location of the house or the motorcycle. Officer McCall, the officer who was present for the earlier eluding incident, also went to

the DMV and questioned appellant. Appellant told him that he had not driven a motorcycle for several months.

While the officers questioned appellant at the DMV, Officer Rhodes learned the location of the residence in the photos from other sources. After leaving the DMV, he went to the address, where he saw a "stretched out" motorcycle with visible chrome wheels and swingarm (part of the rear suspension on a motorcycle) parked in a similar location and at a similar angle in the driveway as in one Facebook photo. Someone had partially covered the motorcycle with a tarp. Officer Rhodes took a picture of the covered motorcycle from the sidewalk. He then walked up the driveway, lifted the tarp off of the motorcycle, and confirmed that it was the one from the July 25, 2013 eluding incident. The motorcycle now had different plates. When Officer Rhodes ran the license plate number, he found that the plates were associated with a different vehicle. Officer Rhodes ran the vehicle identification number and learned that the motorcycle had been reported stolen in New York several years earlier.

After surveilling the residence, Officer Rhodes went to the front door. Appellant answered. When asked about the motorcycle, appellant initially denied knowing about it, but later admitted that he had purchased it from Jones. Appellant also stated that he had recently driven it to get new tires. Before that, it had been at his mother's home. It had been in its current location at the residence, where appellant's girlfriend lived and he frequently stayed, for about a week. Less than one hour had passed between Officer Rhodes questioning appellant at the DMV to this point. Officer Rhodes arrested appellant for receiving stolen

property. During a search incident to arrest, Officer Rhodes found a key to the motorcycle in appellant's pocket.

II. Alleged Fourth Amendment Violation

Appellant first argues that the trial court erred in denying his pre-trial motion to suppress because Officer Rhodes violated appellant's Fourth Amendment rights by entering the property and lifting the tarp to view the motorcycle.

A. Standard of Review

"On appeal, constitutional arguments present questions of law that this Court reviews de novo." Crawford v. Commonwealth, 281 Va. 84, 97, 704 S.E.2d 107, 115 (2011) (citing Shivaee v. Commonwealth, 270 Va. 112, 119, 613 S.E.2d 570, 574 (2005)); see also Archer v. Commonwealth, 26 Va. App. 1, 8, 492 S.E.2d 826, 830 (1997) (stating that "[q]uestions of reasonable suspicion and probable cause to make a warrantless search are subject to *de novo* review"). In our review, we "must give deference to the factual findings of the circuit court and give due weight to the inferences drawn from those factual findings; however, the appellate court must determine independently whether the manner in which the evidence was obtained meets the requirements of the Fourth Amendment." Commonwealth v. Robertson, 275 Va. 559, 563, 659 S.E.2d 321, 324 (2008). "The issue of whether an officer acted with probable cause and under exigent circumstances . . . is a mixed question of fact and law that we review de novo." Robinson v. Commonwealth, 273 Va. 26, 39, 639 S.E.2d 217, 224-25 (2007) (citing

Brown v. Commonwealth, 270 Va. 414, 419, 620 S.E.2d 760, 762 (2005)).

B. Relevant Legal Standards: Protected Searches and Exigent Circumstances

Appellant challenges two separate actions of Officer Rhodes: first, entering onto the property, and second, lifting the tarp to view and photograph the motorcycle. Appellant relies heavily on two recent cases from the United States Supreme Court in support of his argument, United States v. Jones, 132 S. Ct. 945 (2012),[1] and Florida v. Jardines, 133 S. Ct. 1409 (2013).[2] Both cases concern what constitutes a

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[1] In Jones, the Court determined that the government's installation of a GPS device on the defendant's vehicle, and its use of that device to monitor the vehicle's movements, constituted a search under the Fourth Amendment because it "involved a degree of intrusion that a reasonable person would not have anticipated." Jones, 132 S. Ct. at 964. Appellant misconstrues the holding in Jones, ignoring the fact that it primarily concerned the search method, not the object searched. Instead, appellant focuses on the fact that the vehicle in Jones was parked at the defendant's residence, and argues that Jones stands for the unremarkable concept that "[t]he motor vehicle is an effect protected by the Fourth Amendment." Appellant's Br. at 13. More egregiously, appellant fails to note that in Jones, the government forfeited the argument that it had probable cause for the search, and thus the search was lawful under the automobile exception, because it failed to raise the argument below. Jones, 132 S. Ct. at 954.

[2] In Jardines, the Court held that the government's use of a trained police dog to investigate the defendant's home and its immediate surroundings was a "search" within the meaning of the Fourth Amendment. Jardines, 133 S. Ct. at 1417-18. The Court found that an "implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly

protected search under the Fourth Amendment; neither addresses any exceptions to those protections. The Commonwealth does not dispute that Officer Rhodes's actions constituted searches. Accordingly, the question is what exceptions, if any, may apply to each search. The most relevant exception in this case is exigent circumstances.

Exigent circumstances render lawful an otherwise unlawful search. A number of different conditions may create exigencies justifying a warrantless search, including "the officers' reasonable belief that contraband is about to be removed or destroyed[,] . . . information that the possessors of the contraband are aware that the police may be on their trail," or "whether the officers have strong reason to believe the suspects are actually present in the premises." Verez v. Commonwealth, 230 Va. 405, 410-11, 337 S.E.2d 749, 753 (1985). When evaluating if exigent circumstances existed, "the court must examine the circumstances as they reasonably appeared to the law enforcement officers on the scene." Id. at 411, 337 S.E.2d at 753.

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to be received, and then (absent invitation to linger longer) leave," id. at 1415, but that "introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*," id. at 1416. Appellant merely presents the case as support for the familiar concept that the Fourth Amendment protects the curtilage of the home, a point the Commonwealth readily concedes.

C. Analysis

1. Probable Cause

For a search to be lawful due to exigent circumstances, Officer Rhodes needed probable cause to search; accordingly, this is a helpful starting place for our analysis. In support of his argument that Officer Rhodes did not have probable cause to search, appellant contends that Officer Rhodes did not learn that the "motorcycle may have been the same one involved in an earlier eluding incident" until after he trespassed onto the property. Appellant's Br. at 16. This is facially incorrect, as evidence at trial indicated that from the public street, Officer Rhodes could see, as could any other passerby, a number of features unique to this motorcycle. These include the unusual length of the motorcycle due to it having been "stretched out" for drag racing, which was clearly visible even when under the tarp. In addition, the tarp did not extend to the ground, leaving the customized chrome wheel covers and swingarm uncovered. These are all distinctive features Officer Rhodes recognized from the motorcycle he encountered, and videorecorded, during the eluding incident. Furthermore, Officer Rhodes possessed photos of the same motorcycle before someone covered it with a tarp, parked at a similar angle and in the same location at that residence. In light of these facts, Officer Rhodes unquestionably had probable cause to believe that the motorcycle was the one from the eluding incident before entering the property.[3]

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[3] Appellant also argues that Officer Rhodes did not possess probable cause to search because Officer Rhodes did not and does not possess probable cause to charge appellant with eluding, as he

2. Protected Searches and the Curtilage

Having determined that Officer Rhodes had probable cause to search, we now turn to the individual "searches." The first "search" challenged is Officer Rhodes's entry onto the property to examine the motorcycle. "[T]he area 'immediately surrounding and associated with the home'— what our cases call the curtilage—[i]s 'part of the home itself for Fourth Amendment purposes.'" Jardines, 133 S. Ct. at 1414 (quoting Oliver v. United States, 466 U.S. 170, 180 (1984)). "This area around the home is 'intimately linked to the home, both physically and psychologically,' and is where 'privacy expectations are most heightened.'" Id. (quoting California v. Ciraolo, 476 U.S. 207, 213 (1986)).

In determining whether the area in question constitutes curtilage, we generally consider:

> "[1] the proximity of the area claimed to be curtilage to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the

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could not know if appellant was the person driving the motorcycle on the evening in question. This argument confuses the probable cause needed to arrest and charge an individual with the probable cause required to conduct a lawful search. Officer Rhodes had numerous reasons to believe that the motorcycle was the one involved in the eluding incident and that a search would provide information leading to the individual who committed the crime. Officer Rhodes's decision not to pursue eluding charges against appellant, regardless of the reason, did not vitiate the probable cause he had to search.

> resident to protect the area from observation by people passing by."

Robinson v. Commonwealth, 45 Va. App. 592, 605, 612 S.E.2d 751, 758 (2005) (quoting United States v. Dunn, 480 U.S. 294, 301 (1987)). In Robinson, the record contained, and we examined in detail, abundant testimony directly addressing these factors, such as the specific activities performed in the spot where the search took place and exact distances from the house. In the absence of a similarly detailed record here, we decline to conjecture the facts necessary to perform a precise analysis. In any event, we can assume without deciding that Officer Rhodes entered the curtilage when he walked up the driveway because numerous exigencies justified the search; therefore, the assumption fails to alter the ultimate lawfulness of the intrusion under the Fourth Amendment.

3. Exigent Circumstances

Examining the circumstances as they reasonably appeared to Officer Rhodes, numerous exigencies justified both his entry onto the property and his moving the tarp to view the motorcycle and record its identification number. As a preliminary matter, Officer Rhodes had a reasonable belief that the motorcycle could be removed or destroyed, as a motorcycle is readily movable. In fact, appellant recently had driven the motorcycle from where he had originally stored it at his mother's home, to a service station, before bringing it to the residence where Officer Rhodes found it. Moreover, the same motorcycle had successfully eluded the police on two previous occasions, and could potentially have done so again here. However, mere mobility is far from the only exigency Officer Rhodes

faced. Officer Rhodes had, within the same hour, spoken with appellant at the DMV where appellant denied owning or knowing anything about the motorcycle or the residence in the picture. Accordingly, Officer Rhodes not only knew that appellant was aware that law enforcement was investigating incidents involving the motorcycle and where they might find it, but even more, he knew that appellant had an interest in concealing or destroying evidence in order to perpetuate his lies to law enforcement. In fact, when Officer Rhodes arrived at the house, he saw that someone had placed a tarp over the motorcycle, indicating a possible attempt to conceal it. In the brief time between when appellant returned to the house and when Officer Rhodes knocked on the door, he had changed his clothing from what he wore at the DMV to jeans, a heavy long sleeve shirt, and work boots similar to those worn during the eluding incident, despite it being over 90 degrees that day. Appellant even had the key to the motorcycle in his jeans pocket. Although the search took place before appellant returned home and changed, these actions further speak to the reasonableness of Officer Rhodes's belief that appellant might attempt to relocate the motorcycle. Together, the facts indicate that appellant not only possessed an interest in, but also the ability and probable intention to, move the motorcycle out of the reach of law enforcement. See Thims v. Commonwealth, 218 Va. 85, 91, 235 S.E.2d 443, 446 (1977) (holding that exigent circumstances existed when law enforcement went onto private property to examine a stolen vehicle, despite the fact that defendant, and the keys to the vehicle, was in police custody). In view of the above, we conclude that sufficient exigencies existed for Officer

Rhodes to enter the property and examine the motorcycle.

Furthermore, the Supreme Court of Virginia has previously upheld a search where an officer walked up a defendant's driveway and recorded a stolen car's vehicle identification number, stating:

> [The officer] had probable cause to believe that the car was the fruit of a crime [and] that it might be stolen . . . . He then for the first time had probable cause to seize and search the vehicle. To do so he had the right to enter the driveway and open the car door to determine the identification number. Such an investigation, when made on public property or property open to the public, has been held not to be a search, or if a search, to be a reasonable one, even in the absence of probable cause. Here, while the investigation was made on private property, it was grounded on probable cause.

Id. at 91-92, 235 S.E.2d at 447 (citations omitted). The Court also upheld the search on the alternative grounds that "in addition to probable cause there were exigent circumstances arising from the inherent mobility of a motor vehicle." Id. at 93, 235 S.E.2d at 447.[4] Accordingly, for the reasons stated, we find that

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[4] We note that the United States Supreme Court has suggested that a search of a vehicle on private property requires more than mere mobility, as is generally sufficient under the "automobile exception." Coolidge v. New Hampshire, 403 U.S. 443, 460 (1971) (plurality opinion) (stating that "'exigent circumstances' justify the warrantless search of 'an automobile stopped *on the highway*,' where there is probable cause, because the car is 'movable, the

Officer Rhodes acted lawfully under the Fourth Amendment in entering the property and searching the motorcycle.

III. Sufficiency of the Evidence

Appellant's second assignment of error challenges the sufficiency of the evidence that he knew that the motorcycle was stolen. In support of this argument, he first alleges that Officer Rhodes lied repeatedly under oath and intentionally misled the court. Next, he argues that the trial court was plainly wrong in finding that Officer Rhodes's testimony was nearly identical to Officer McCall's testimony, and therefore could be treated as credible. Finally, he argues that Jones's testimony was inherently incredible.

A. Standard of Review

"Whether the evidence adduced is sufficient to prove each of those elements is a factual finding, which will not be set aside on appeal unless it is plainly wrong." Lawlor v. Commonwealth, 285 Va. 187, 223-24, 738 S.E.2d 847, 868 (2013) (citing George v. Commonwealth, 242 Va. 264, 278, 411 S.E.2d 12, 20 (1991)). "In reviewing that factual finding, we consider the evidence in the light most favorable to the

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occupants are alerted, and the car's contents may never be found again if a warrant must be obtained'" (quoting Chambers v. Maroney, 399 U.S. 42, 51 (1970)); see also California v. Carney, 471 U.S. 386, 392-93 (1985) (discussing the automobile exception's relevance "[w]hen a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place *not regularly used for residential purposes* . . ." (emphasis added)). Here, we need not rely on the automobile exception, for exigencies existed aside from the inherent mobility of the motorcycle.

Commonwealth and give it the benefit of all reasonable inferences fairly deducible therefrom." Id. at 224, 738 S.E.2d at 868 (citations omitted).

B. Analysis

Appellant argues that there was insufficient evidence that he knew the motorcycle was stolen. In support of this argument, he alleges that both Officer Rhodes[5] and Jones[6] lied under oath. He also argues that the trial court was plainly wrong in finding that Officer Rhodes's testimony was nearly identical to

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[5] Appellant presents a number of muddled arguments and examples ostensibly showing that Officer Rhodes intentionally misled the trial court. Although appellant failed to include citations to the transcript to support most of his claims on this issue, it appears that during the May 7, 2014 trial, Officer Rhodes struggled to recall certain facts he testified to during the October 17, 2013 preliminary hearing (such as exact dates or numbers of times he spoke to certain individuals or went to certain locations). During a demanding cross-examination, appellant's counsel pressed on these inconsistencies as evincing deceptive intent. Officer Rhodes apologized, stating that he felt "somewhat out of it" because he was sick, taking medication, and had been at the doctor that morning. App. at 206.

[6] We decline to pick apart the specific testimony appellant highlights as inherently incredible to explain why the fact-finder reasonably believed it. Appellant ultimately wishes for this Court to determine "the most logical inference" the fact-finder should have drawn from Jones's testimony, and what Jones "most likely told" appellant when he purchased the motorcycle. Appellant's Br. at 32-33. However, we, as an appellate court, may not "preside *de novo* over a second trial." Haskins v. Commonwealth, 44 Va. App. 1, 11, 602 S.E.2d 402, 407 (2004).

Officer McCall's testimony, and therefore could be deemed credible despite some inconsistencies.[7]

When appellant challenged the sufficiency of the evidence of guilty knowledge at trial—specifically pointing to Jones's and Officer Rhodes's purported deception or dishonesty—the trial court considered the evidence, and found a substantial number of inconsistencies in appellant's statements which called

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[7] Appellant challenges the trial court's conclusion that Officer McCall's testimony was substantially similar to Officer Rhodes's, because Officer McCall was not present when Officer Rhodes questioned appellant at the residence, and some differences existed between their questioning of appellant at the DMV. However, the trial judge's conclusion was just one small piece of his ultimate finding that sufficient evidence existed of appellant's knowledge that the motorcycle was stolen. Specifically, after noting that Jones testified that he told appellant that he believed the vehicle was stolen because it had no title, the judge continued:

> So, then the Court looks at the testimony of the defendant when he is confronted by the officers, and there did appear to be some confusion by Officer Rhodes as to what he remembered, but as was true of defense witnesses, these events happened a while ago. However, the Court would note that Officer McCall's testimony was almost identical to Officer Rhodes' testimony. Officer McCall testified that he responded to the DMV, and after giving the defendant Miranda he asked him about the motorcycle, and he said the defendant said that he had not owned a motorcycle in a month, that he had not driven any motorcycles, that the last motorcycle in months, the last motorcycle he owned was green and that that was all that he knew.

App. at 262. The judge went on to discuss the other inconsistencies in the testimony, discussed *infra*, ultimately concluding that together, the evidence supported a finding that appellant knew that the bike was stolen.

into question his argument that he did not know the motorcycle was stolen. Even if the fact-finder did not believe Jones when he testified that he told appellant that the motorcycle had no title and he assumed it was stolen, it could have concluded appellant knew based upon his numerous subsequent lies to law enforcement. When questioned at the DMV, appellant told both Officer Rhodes and Officer McCall that he had never seen the motorcycle, despite the fact that he had a photo of it on his Facebook profile and Officer Rhodes arrested him at the residence where it was parked later that same day. During the questioning at the DMV, appellant also stated that he had not owned a motorcycle for a month and that the last motorcycle he owned was green. The trial court noted that, adopting the defense's theory that appellant did not own the motorcycle at the time of the eluding incident, a reasonable innocent person in appellant's position would have acknowledged that he owned the motorcycle, but explained that he did not own it on the date in question. Instead, appellant lied, which the trial court may reasonably consider as evidence of his knowledge that the bike was stolen. See Hawkins v. Commonwealth, 288 Va. 482, 486, 764 S.E.2d 81, 84 (2014) (noting that a fact-finder may properly consider a false or evasive account as evidence of guilty knowledge (citing Covil v. Commonwealth, 268 Va. 692, 696, 604 S.E.2d 79, 82 (2004))).

Furthermore, the fact-finder could have considered numerous other inconsistencies in appellant's argument to the trial court and statements to law enforcement. For example, appellant's mother testified that appellant had parked the motorcycle at her residence for most of August of 2013, where it sat

plainly visible. Appellant's girlfriend testified that she had never seen the motorcycle until he brought it to her new residence in early September, despite the fact that she was living out of appellant's mother's home part-time and frequently visited and spent nights there. In addition, there was evidence of an attempt to conceal the motorcycle, such as someone changing the motorcycle's tags between the date of the eluding incident and the date of the search. Moreover, as noted above, after the officers questioned appellant at the DMV, Officer Rhodes saw that the previously uncovered motorcycle was now under a tarp. Finally, when Officer Rhodes confronted appellant at the residence, he changed his story several times, first telling Officer Rhodes that he did not own or know anything about the motorcycle, then that it belonged to a friend, before finally admitting that he had purchased the motorcycle from Jones.

"When weighing the evidence, the fact finder is not required to accept entirely either party's account of the facts. The fact finder may reject that which it finds implausible, yet accept other parts which it finds to be believable." Barnes v. Commonwealth, 33 Va. App. 619, 630, 535 S.E.2d 706, 711-12 (2000) (citing Barrett v. Commonwealth, 231 Va. 102, 107, 341 S.E.2d 190, 193 (1986)). Perhaps another fact-finder could have found Jones or Officer Rhodes not credible or their testimony unbelievable, or agreed with appellant's interpretation of the facts instead of the Commonwealth's. However, the fact-finder here did not, and we are "not permitted to reweigh the evidence." Nusbaum v. Berlin, 273 Va. 385, 408, 641 S.E.2d 494, 507 (2007). The trial court was not plainly wrong to conclude that sufficient credible evidence existed to find that appellant knew

the bike was stolen; accordingly, it did not err in denying appellant's motion to strike.

IV. Conclusion

For the foregoing reasons, we find the trial court did not err in denying appellant's motion to suppress or motion to strike. Accordingly, we affirm the ruling of the trial court.

Affirmed.

APPENDIX C

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE

COMMONWEALTH OF VIRGINIA,

Plaintiff,

v.

RYAN COLLINS

Defendant.

COURT APPEARANCE

Taken on

April 30, 2014

LANE'S COURT REPORTERS, INC.
401 8th STREET NE
CHARLOTTESVILLE, VIRGINIA 22902

[p.2]

APPEARANCES:

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Attorney for Commonwealth

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252 E. High Street
Charlottesville, VA 22902
Attorney for Defendant

Before: The Honorable Cheryl V. Higgins

CONTENTS

WITNESS - COMMONWEALTH

David Rhodes

DIRECT	CROSS	REDIRECT	RECROSS
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WITNESS - DEFENSE

Candice Beach

DIRECT	CROSS	REDIRECT	RECROSS
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Terry Roberts

DIRECT	CROSS	REDIRECT	RECROSS
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EXHIBIT

NUMBER	DESCRIPTION - Commonwealth	RECEIVED AT PAGE
1	Facebook photo	7
2	Pictures of house	11
3	Photo of motorcycle	13
4	Receipt from Jarman's	16

NUMBER	DESCRIPTION - Defense	RECEIVED AT PAGE
1	Still photo	4

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April 30, 2014

THE COURT: Good afternoon, Mr. Weber, how are you?

MR. WEBER: Good afternoon, Your Honor.

THE COURT: So let the record reflect that his is the case of Commonwealth v. Ryan Collins. Mr. Collins is in the courtroom with his counsel Mr. Weber and Mr. Casey and Ms. Winn are here on behalf of the Commonwealth and we are here for the defense motion to suppress. Are both sides ready to present?

MR. WEBER: We are, Your Honor.

THE COURT: And is there a motion to exclude witnesses?

MS. WINN: No, Your Honor?

THE COURT: Mr. Weber?

MR. WEBER: We're not going to make a motion.

THE COURT: So opening statement, Mr. Weber?

MR. WEBER: Your Honor, this is a case where the motion suppress is based a search without a warrant. So I believe it is up to the Commonwealth to put evidence on what would show that the search was

within the bounds of law. We'd ask that they put their evidence on.

THE COURT: Thank you. Ms. Winn, do you wish to make an opening statement?

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MS. WINN: Your Honor, the Commonwealth rest on our brief.

THE COURT: Have you had an opportunity to read that Mr. Weber?

MR. WEBER: I have.

THE COURT: Thank you. So, Ms. Winn, your first witness.

MS. WINN: Your Honor, the Commonwealth would like to call Officer David Rhodes.

THE COURT: Officer Rhodes, if you'll remain standing at your witness box and raise your right hand the clerk will swear you in.

OFFICER DAVID RHODES, having been so duly sworn, testified as follows:

DIRECT EXAMINATION

By Ms. Winn:

Q Good afternoon, Officer Rhodes, are you Officer Rhodes with the Albemarle County Police Department?

A Yes, I am.

Q And were you working on September 10th in that capacity in that uniform displaying your badge of authority?

A Yes, I was.

Q Did you respond to a call that day?

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A I did.

Q And could you briefly describe what happened.

A I responded to DMV on Abby in the Pantops area of Albemarle County. There were other officers on the scene there that were investigating or had been called there for a stolen vehicle or a report of a stolen vehicle that was being attempted to being registered in the State of Virginia that was actually stolen or reported stolen out of New Jersey. So there were---other officers were there at the DMV. While listening to radio traffic Mr. Collins name came up on the radio related to that vehicle and I had been looking for Mr. Collins to speak with him. So I responded to the DMV so I could speak with him in reference to another case.

Q Okay, and so when you responded to---when you went to the DMV to speak with him about the other case, what were speaking to him about?

A I wanted to speak with him in reference to a motorcycle that I had attempted to stop on July 25th of 2013 on 250 Bypass in Albemarle County.

Q Did you show him the photographs at that time?

A I did. During our conversation when he was attempting again, attempting to register this vehicle

and he was speaking with some other officers in the---based on from his Facebook page I was able to get a couple of pictures that I showed Mr. Collins.

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Q Some of these Facebook photos are here today and I would like you to identify a couple of them and then I have questions to ask you about them. This is the first one?

A This is a picture from---on his Facebook page I used my department issued phone to take a picture of the picture from the Facebook page that was displayed on a laptop computer inside a car.

Q And I'm going to show that to defense counsel and then have that introduced as an exhibit.

MR. WEBER: I've seen that, no objection.

Q Your Honor, I'd like to move to admit this as Exhibit 1.

MR. WEBER: No, objection.

THE COURT: Mr. Weber it appears she has a series of pictures. Have you reviewed them all?

MR. WEBER: Let me see what you've got. I'll make sure I've reviewed them all.

Q Sure.

THE COURT: My follow-up question to that is going to be can we admit them collectively eventually as Commonwealth Exhibit #1?

Q Yeah, no, two of them are Facebook photos and two of them are photos that the officer took later on so I'd like to admit those Exhibits 1 and 2.

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THE COURT: That would be appropriate.

MR. WEBER: Your Honor, I have no objection to that.

Q So these with the Exhibit 1.

THE COURT: So the Court is going to admit the collectively as Commonwealth's Exhibit #1 and to clarify, I think I took the picture from you before you ask the officer; this is also a Facebook picture from his phone?

Q Yes, ma'am.

THE COURT: Thank you.

(Commonwealth's Exhibit #1 was so duly marked and received into evidence at this time.)

Q And so I'd like to ask you a little bit about those first two Facebook photos.

A Yes, ma'am.

Q The (unintelligible) one or the first photo show the silver car. Could you tell me a little bit about that?

A The first photo is a silver Acura parked on the---perpendicular to the curve and a black Acura, appears to a black Acura parked in the driveway with a Silver (sorry) Toyota 4-Runner in front of ranch style

brick resident. And that silver Acura appears to be the same Acura that was

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attempting to be registered at DMV the same day that I was there.

Q Okay. In the second photograph where it shows a black vehicle and then the motorcycle could you tell us a little bit about that one?

A The second photo is black Acura that's parked again, was from his Facebook page that's parked in the driveway behind the same 4-Runner that's depicted in the first picture and the motorcycle is parked along the edge of the brick kind of a wall there, it's a retaining wall, if you will. It's parked along there between the black Acura and the silver 4-Runner is a orange and black motorcycle that's clearly visible in that second picture.

Q Now I want to talk a little bit more about that black and orange motorcycle? Were there some unique characteristics about that motorcycle?

A Yes, it had been stretched out, which means the commission of motorcycle, the rear end had been added on to make it longer which normally indicative of a racing type motorcycle, drag racing, or a sport bike or that kind of thing. It had been stretched out. It's not, it didn't look like a conventional motorcycle. It also was chrome. It had chrome swing arm on it and also chrome wheels on both the front and the back which was somewhat unique to that motorcycle. Not something you'd normally see driving down the

[p.9]

roadway and not something you can buy from the factory either. So that's a customized type motorcycle.

Q What is a swing arm?

A It's the part of the---the rear part of the motorcycle that the rear tire attaches to from the frame that extends out the back where the rear tire actually attaches to it. That's the swing arm of the motorcycle.

Q Thank you. And so did you know where this house was in fact, (unintelligible)?

A I did not, at the time I was not---looking at the pictures I was not aware of where that house was located at the time. I went to Mr. Collins with the pictures and showed him those photographs that I had taken on my phone and asked him if he knew where that was of his motorcycle. And he told me he didn't know anything about it or where it was located.

Q And then did you find out where that house was located?

A Yes, I did. I was able to obtain information from an informant that the house was located on Delmeade Avenue.

Q And is Delmeade Avenue in Albemarle County?

A It's in the City of Charlottesville.

Q How close is it to the border of Albemarle County?

[p.10]

A Maybe a block away from the county line.

Q And so after you found that out from the informant what did you do next?

A Well I spoke with Mr. Collins a little bit more about the pictures and the photographs and asked him how long it had been since he had ridden the motorcycle. He told me it had a few---his exact statement to me was "it had been a long time". I asked him what a long time meant. And he told me a few months. We talked a little bit more about the title of the vehicle and some other things and then he left. Once I established where the---where that motorcycle possibly was based on that photograph and based on the informant information I then went to Delmeande Avenue.

Q And when you reached Delmeade Avenue did you find the house in the Facebook photograph?

A I did.

Q And did you find---what did you see in the driveway of the house?

A There's actually another picture so you can maybe if you want to refer that what I saw as I was driving down Belmeade Avenue.

Q Can I show you these two photos.

A Sure.

Q And then I'll show them I'll show them to (unintelligible)

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A As I was driving down Delmeade Avenue plainly from the roadway you can see a motorcycle just underneath a cover on Delmeade Avenue in the driveway---the address was 2304 Delmeade Avenue. In that address in the driveway there was a motorcycle that was parked there behind a silver 4-Runner which would match the description photo that I had just seen thirty minutes prior. That motorcycle was covered up with a white cover. But from the roadway I was able to see that the motorcycle, based the silhouette underneath the tarp or the cover for it was much longer than what the conventional motorcycle would normally look like covered up. It was much longer and also the chrome, the front view of the motorcycle was sticking out from under the cover and it was chrome which appeared to be the same motorcycle that I had attempted to stop and the one I was looking for.

Q I'm actually going to (inaudible) And we'd like to admit that as Commonwealth's Exhibit #2?

THE COURT: Is there any objection?

MR. WEBER: No objection.

THE COURT: So the Court will admit the picture of Commonwealth Exhibit #2.

(Commonwealth Exhibit #2 was so duly marked and received into evidence at this time.)

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Q And officer is photograph in Exhibit 2, you took that that day?

A I did. I took that before I removed the cover on the motorcycle, yes.

Q And so just so I'm clear, you could see from the photograph that it did have that extension that made it longer than a conventional motorcycle?

A Yeah, from the silhouette and the outline underneath the cover it appeared to be much longer than what normal motorcycle would be under a cover. I've seen several motorcycles covered over fifteen years as a police officer and those motorcycles normally, the conventional ones look much shorter underneath that. The cover actually drapes off of it more on the front and the back than it was this one. It was standing up a little bit more on the motorcycle which indicated to me it was a little bit longer than the conventional motorcycle.

Q And so then the second photograph that I asked you about, the photograph that you took after you uncovered the motorcycle?

A Yes, ma'am, that's correct.

Q I'll show them to Mr. Weber.

MR. WEBER: No objection, Your Honor.

Q We'd like to admit that as Commonwealth's number 3.

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THE COURT: So the Court will admit it.

(Commonwealth's Exhibit #3 was so duly marked and received into evidence at this time.)

Q And just one question about Exhibit #3 there you can more clearly see that there is that extended sway arm where the wheel, the rear wheel is sort of bumped out behind the motorcycle?

A Correct.

Q Okay. And so while this was happening were you working with another officer at the time, too?

A I was, yes.

Q Okay. And so could you tell me a little bit about that?

A Officer Litton was there with me and we knowing that motorcycle is removal and able to be moved for evidentiary value we had (unintelligible) to determine if this was motorcycle that I was, in fact, looking for. So I, once I removed the cover then I ran the tag on that motorcycle that was displayed on the motorcycle at the time. It came back to a Kawasaki out of Waynesboro that was sold. Based on that I got the VIN number off the motorcycle and then ran that as well.

[p.14]

Q And then could you also tell me a little about what you had instructed Officer McCall to do in the county?

A Yes, I received information that Mr. Collins had taken a motorcycle very recently to Jarman's Sports Cycle in Charlottesville to have two news tires put on it. I asked Office McCall then to go to Jarman's and see if, in fact, that motorcycle had been there for any type of service in the last, in the recent time, which he did.

Q And I'd like to present to you a receipt that Officer McCall pulled from Jarman's Motorcycle. Could you review that?

A The receipt is dated September 2nd, 2013. And it's listed as the repair order for Austin Ryan. Mr. Collins name is Ryan Austin Collins and it is listed as Austin Ryan with a 1014 Long Street address, which I believe is an old address that Mr. Collins used quite some---many years ago. The vehicle is described as a 2008 Suzuki with a VIN number, I'll read the whole VIN number---the VIN number is off based on the VIN number of the motorcycle and the VIN number that they had listed at Jarman's of the vehicle being serviced is off by one number. I believe that is probably a key stroke error I'm sure with Jarman's. I don't know that for sure but I would believe being off by one number which is the four digits on the---Jarman's records shows the last four digits on this one as 1585 in the VIN and the actual

[p.15]

VIN is 1685. So they, instead of a six it's a five. It shows on here that it was not purchased from them and the job for and they then they show that it's a 2008 Suzuki GSXR 600. And it doesn't show, doesn't show what they did to it. I don't see on here what they actually did to it. But it's---a $186 was to total of the bill. So it was eight days prior to the date that I was speaking with Mr. Collins or had had found the motorcycle.

Q Thank you, officer.

THE COURT: When did you obtain this information from Officer McCall?

A The same day within about an hour. Actually while I was speaking with Mr. Collins at his residence on Delmeade Avenue. Officer McCall brought me that printout from---that he had gone to Jarman's while I was actually on Delmeade Avenue to look at that.

THE COURT: So did you receive this information before or after you had taken the cover off of the bike?

A Probably after I had removed the cover.

THE COURT: So is there any objection to the admittance of Commonwealth's Exhibit #4, Mr. Weber?

MR. WEBER: Not for purposes of this hearing.

THE COURT: So the Court will then admit Commonwealth's Exhibit #4.

[p.16]

(Commonwealth's Exhibit #4 was so duly marked and received into evidence at this time.)

Q Thank you. And so after you found this information from Officer McCall did you speak to Mr. Collins about the Jarman's transaction?

A I did.

Q And could you describe what happened when you spoke with him about that?

A Yeah, actually, back up just a little bit. I knocked on the door. Mr. Collins came to the door. He stepped outside to speak with me. I asked him if he knew anything about the motorcycle. He told me originally he didn't know anything about it. He then changed his story a couple times and said that it was a friend's

motorcycle. Eventually I asked him where he'd gotten the motorcycle. He gave me that information. When I asked him when he'd last ridden the motorcycle he told about a week ago from his mom's house in Northfield's to Delmeade Avenue. And this was actually a change from his story that he had told me at the DMV about forty-five minute---forty-five minutes to an hour prior to that. After speaking with---after getting the information from Officer McCall, let me see what his statement was about that, I spoke with Collins about that, about the Jarman's information. He admitted---he finally admitted

[p.17]

to me that he had ridden it to Jarman's and when he had left his mother's house to get tires put on it.

Q And Officer when you were speaking with Mr. Collins that day could you describe his outfit or what he was wearing that day?

A He was wearing, initially when I was talking to him at DMV he was wearing shorts and flip flops and a t-shirt or something pretty casual, best I recall to that. Then once I spoke with him at Delmeade he had changed clothes and actually had put on a pair of jeans and had on a pair of boots and a long sleeve shirt. It was a hot day that day of September. It was probably in the mid 90's that day. It was pretty hot.

Q And so after you spoke with him about the motorcycle and he did admit that he took it to Jarman's a week prior what did you do next?

A Once I determined based on the VIN, that the VIN number had come back as a stolen vehicle and it

had been confirmed as being stolen I placed Mr. Collins under arrest for that and for the violation of the title.

Q And did you perform a search incident to arrest?

A I did.

Q And did you find anything during this?

[p.18]

A I found one single key in his pocket which appeared to be a motorcycle key. I went over to that motorcycle. Placed it in the motorcycle and it turned on and obtained the mileage, it's a digital readout on the motorcycle and obtained the mileage off of the readout of the motorcycle.

Q And what was that? Do you have the reading?

A I don't recall what the mileage was at that time, no?

Q Thank you for that, no further---oh, I have a couple more questions. And could you actually tell the Court briefly about moving back to that time in July that you referenced in the beginning just briefly about what happened in July when tried to stop the motorcycle?

A Yes. I was traveling southbound on 250 Bypass. I've got an unmarked car. I'm assigned to the traffic unit and have been for five years. I was traveling southbound on 250 Bypass approaching the Ivy Road, Old Ivy Road area. There was no vehicles anywhere around at that particular moment. I observed a motorcycle coming up behind me at a very high rate of speed. There was no vehicles between myself and that

motorcycle at all. I activated the rear antenna on my radar on my vehicle in the moving mode in the same direction mode and obtained a speed of 100 miles per hour in a posted 55 mile per hour zone. I---the motorcycle then came up to my left and we made eye contact. The driver was wearing a helmet that had a tinted shield on it so I couldn't see anything inside the helmet. I attempted---I turned on my emergency equipment. I attempted to stop the motorcycle. The motorcycle then immediately took off at a very high rate of speed over 140 miles per hour on the Bypass southbound. Then it got on the interstate and I stopped attempting to try to stop it. It was driving too reckless.

Q And would describe the driver's---what the driver of the motorcycle was wearing that day in July?

A Jeans and tan boots, some type that appeared to be like Timberland type boots and a long sleeve hooded sweatshirt, or some type of hooded clothing. I'm not sure what it was exactly, but it appeared to be gray, I believe, the best I can recall.

Q And would you say the boots were similar to the boots that he was wearing that day (unintelligible)

A Yes, I would say so.

Q And could you tell me what the make and model of the motorcycle of the motorcycle that you found at the address on Delmeade Avenue?

A It was 2008 Suzuki.

Q And do you recognize the defendant in court today?

A Yes, Mr. Collins over here.

[p.20]

Q Thank you. And also, so I want to go back quickly about the conversation you had with him after you went to the door and you answered the door on Delmeade Avenue. What was his---when he said that the motorcycle belonged to a friend and then you said he changed his story, what was his story after he said that it belonged to a friend?

A If I could look at my notes? He eventually---he just told me that he had ridden the motorcycle from his mother's house in Northfields over to Delmeade.

Q Did he say anything about the relationship of the motorcycle with Mr. Eric Jones?

A Yes, he did tell me that he had bought the bought the motorcycle from Eric Jones.

Q And did he said that after he said that the motorcycle belonged to a friend?

A Yes, that's correct.

Q And just for clarification when you ran the VIN what came up?

A It came up being as stolen out of New York State.

Q Thank you, so much, Officer Rhodes, please answer any questions Mr. Weber's may have for you.

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CROSS-EXAMINATION

By: Mr. Weber

Q Officer Rhodes, I am going to probably rehash a little bit of this here.

A Okay.

Q But I want to establish a couple of thing. When you went to DMV you were going there to investigate this eluding issue, is that correct?

A That's correct.

Q You weren't specifically tasked to investigate the issue of the car that was alleged to have been stolen?

A That's correct.

Q And isn't it true that later on that day it was determined that the car that he was trying to register which was the silver Acura in photograph #2 was, in fact, not stolen, is that correct?

A That's correct, it was reported stolen out of New Jersey, but it was not.

Q We can clear that issue. That issue is off the table.

A That's correct.

Q So when you went up there your sole purpose in life was to talk to him about the eluding charges, is that right?

[p.22]

A Yes, sir, that's correct.

Q All right, on this eluding---on the eluding day, this was on the 250 Bypass, you said the motorcycle

came up behind you at a high rate of speed about 100 miles an hour, is that right?

A 100 miles per hour, exactly, yes, sir.

Q Okay, it came up right beside you when you tried to get off and you came back on you were slowed down to under to under 55 at that point?

A I don't think I ever testified to trying to get off and get back on but that is actually what happened, yeah.

Q Okay. But you tried to get off---it looks like you think of getting and you came back on and he came up beside you, is that right?

A Yes.

Q And you got a chance to look directly at the person who was riding the motorcycle?

A That's correct.

Q And the person on the motorcycle had a helmet with tinted mask on it and you couldn't identify him from Adam is that right?

A That's correct.

Q All right. And all you noticed that it was an orange Kawasaki and as soon as you put your lights on---

[p.23]

A That's an orange---orange/black Suzuki.

Q Suzuki, I'm sorry. I said, Kawasaki, it was a Suzuki. But as soon as you put your lights on he took off, is that right?

A That's correct.

Q And you got a picture of that vehicle taking off, did you not?

A I did, that's correct.

Q Your Honor, if I may access my Ipad here?

A Yes.

Q It's the only way I can it in color rather than black and white.

MS. WINN: Actually we have a copy of that if you would like---

THE COURT: Mr. Weber, I believe the Commonwealth has a copy of that picture.

Q Yes, let me show you a picture. That's the picture you took of the vehicle on July 25th?

A This is a picture of a paused video out of my vehicle.

Q Okay. It came from your vehicle.

A That's correct.

Q And it's on July 25th.

A Correct.

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Q That's the same vehicle that was trying---that was eluding you on that day, is that right?

A That's correct, yes, sir.

Q Same driver, same vehicle, is that right?

A Yes, this is the same, the incident is the same, this is the photograph of a paused video, in-car video out of my vehicle. So I took---so I played the video on a large screen at the police department and paused it at this moment and took a still shot video with my department issued phone so I would have a photograph to look at, yes.

Q No, don't think you testified to it here, but in the court below you were accompanied by Officer McCall when you went up there to talk to Mr. Collins about the eluding issue, is that right?

A Officer McCall was already there. He got there about the same time I did, yes, because he was going to speak to Mr. Collins about another eluding issue as well.

Q And Officer McCall had another incident of eluding?

A Prior to mine.

Q Prior to yours. His was dated June the 4th?

A Correct.

Q Of 2013 and yours was July 25th so about 6 weeks apart, is that right?

A Yes, sir.

[p.25]

Q All right, so the two of you were up there and you wanted to talk to him about the same issue, all about eluding, June the 4th and July the 25th?

A That's correct.

Q All right. Now when you first went up there, so Officer McCall was there and he was already discussing the issue of the silver Acura, right?

A There were other officers there. There were several officers there already, right.

Q Couple for the city, couple for the county, maybe?

A There was nobody for the city, but there was a couple officers there. I don't recall every officer that was there, but Officer McCall and I got there about the same time.

Q But it was you that initiated the conversation about the eluding, is that right?

A I believe so.

Q Did you show that photograph to Mr. Collins?

A I believe I did, yes.

Q You did. You said, I want to talk to you about eluding and you showed him that photograph?

A Correct.

Q From that point on he's denying that he's eluding?

[p.26]

A Yes.

Q He denied that was him in that photograph, is that right?

A Yes, sir.

Q And so he never admitted and that's the photograph that you showed?

A That's correct.

Q All right. Now you also said that while Officer McCall was talking you went back to your computer in your car and you took some photographs of his Facebook page, is that right?

A That's correct.

Q You took those photographs on that day?

A Yes, I did, while he was still standing in the parking lot of DMV.

Q So those photographs were still on his Facebook page on that day?

A Yes, they were there. I looked right at them, yeah.

Q Didn't you testify in the court below that they had been taken off his Facebook page after July 25th?

A I'm not sure when they were taken off, but they were there on his Facebook page when I looked. I can't testify to whether he put them on or took them off, but I know

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that they were taken off at some point because when we went to look for them again they were no longer there.

Q Did you have access to his Facebook page?

A I don't personally, no.

Q Somebody in your unit?

A Yes, somebody has access to his Facebook page.

Q Is it a police officer?

A Yes.

Q Okay. So the police officer was with you on your computer getting access to his Facebook page?

A On their computer, yes, sir---on their computer, yes, sir.

Q All right. You said as a result of looking at those pictures on Facebook you recognized the house as being somewhere on Delmeade Avenue, is that right?

A I believed it to be somewhere around there. I worked for the city for a while and I knew that area somewhat.

Q You worked for the city and you recognized the neighborhood?

A Yeah.

Q And you went over there and that's when you saw the photograph, I mean you saw the motorcycle with the cover on it?

A Right.

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Q Is that right. And you said based upon the sellouts and the little bit of chrome on the wheels it looked like it could be the same motorcycle?

A It appeared to be, yes.

Q That appeared on July the 25th, is that right?

A Yes, sir, that's correct. And this isn't a, as far as being able to see it, obviously this is a blurry picture but I'm looking right, you got to remember I'm sitting in the driver's seat of the car looking, I've got windshield, I've got a side window here, so I'm looking, we're literally from here to the table. I could almost, if I opened the window, almost reach out and touch the driver and the motorcycle itself. So this picture really doesn't do justice from my naked eye to look at that motorcycle and to be able to identify it better with my naked eye than what this picture does. So, me looking at that through the windshield and sitting in the driver's seat and actually looking out my window at that motorcycle is much clearer and much easier for me to identify than what this photograph does, if that makes any sense.

Q I understand, but when you arrived on Belmeade Avenue it's covered.

A Right.

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Q The only thing you can see is a silhouette and a little bit of chrome under the right wheel, on the right wheel, is that right?

A Right, correct, yes, that's correct.

Q Couldn't see the color of it? Couldn't see anything else to identify it as that same motorcycle?

A Absolutely, that's correct.

Q I mean it's a silhouette and a little bit of chrome?

A I wouldn't say a little bit, but it was enough as you can see in that picture there, you know, that much of the cover probably sticking up. There's not, you know, a little sliver. It's the, you know, a quarter of the wheel probably sticking out from underneath the cover.

Q Okay. And based upon the silhouette and the chrome you went up and took the cover off?

A That's correct.

Q And that, by the way that's in a driveway of a residence, is that right?

A Yes, sir, that's correct.

Q And you've got to walk up the driveway, probably maybe two or three car lengths to get to where the---

A There's probably a car length, yeah, a car length or two, something like that, yes, sir.

[p.30]

Q Okay, so you're on private property and you pulled the cover off and the first thing you see is a tag number?

A Yes, sir.

Q Now on July 25th you got a tag number off there didn't you?

A I did.

Q Okay. It wasn't the same tag number that was on the motorcycle in the driveway?

A No it was not, correct.

Q Okay. Did you run the tag number after the eluding incident?

A I did. I came back not on file. And once I talked with Investigator Davis from the DMV, that tag has not been active for several years so that would make sense that it would come back not on file because it is not on file once it's---after some amount of time it's not on file. But DMV, they deactivate that tag and they no longer have any information. When I went to PISTOL and ran that tag it came back to Eric Jones, that that motorcycle or that tag had been attached to Mr. Jones, Eric Jones at some point in time on another motorcycle, which is the same person that Mr. Collins told me he bought the motorcycle from. So I did get some information off that tag. But, unfortunately I couldn't find where that motorcycle actually belonged.

[p.31]

Q The pointed I'm getting at, the association of the tag number on July 25th to Eric Jones, did that come before or after September 10th?

A It came July 25th. When the eluding occurred I ran that tag number. When I'm looking out the window I actually ran the tag with the dispatcher as I'm trying to stop the motorcycle.

Q Right.

A In fact, I actually wrote the tag number on my hand before I tried to stop it because I was afraid the motorcycle wouldn't stop. When I ran that tag it came back not on file. That was on July 25th. Also on July 25th I then looked into our local database, our local computer within the police department, not DMV related, but local computer that we house all of our information for the city, county and university and another officer had stopped a motorcycle with the same tag that I was attempting to stop this motorcycle on about two years prior that Mr. Jones was operating and was issued a summons with Mr. Jones attached to that tag. So the tag that was on the motorcycle then did not come back on file to DMV but it did have information locally. Does that help clear up your question? And that was all done on the same date of July 25th?

Q Okay. So July 25th you associated Eric Jones with that eluding charge?

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A No, I associated the tag number with Eric Jones. I could associate him with the eluding charge because I couldn't identify the rider of the motorcycle.

Q But did you try to develop suspects?

A Uh-huh. (Indicating. yes.)

Q It would be reasonable based upon your investigation of the tag number that Eric Jones was a suspect?

A Sure.

Q Did you talk to Eric Jones on July 25th?

A I did. He told me he sold the motorcycle.

Q When did you talk to him?

A I don't recall the date.

Q Was it before or after you arrested---

A Both, I've spoken with him after and I've also spoken with him before.

Q Okay, and he got arrested on September 10th.

A That's correct.

Q So how far in advance of September 10 did you talk to Eric Jones?

A I don't recall. It was sometime after the July 25th date. I just don't recall exactly. I don't remember.

Q Okay. So it must have been Eric Jones who told you that he sold the bike to Mr. Collins?

A I was able to develop that information. Mr. Jones was very difficult to contact and get a hold of

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basically. But I was able to get that information that Mr. Collins was supposedly riding that motorcycle based on an informant, yes.

Q Based on an informant. Was the informant Eric Jones?

A It was not.

Q It was not. Was it William Frazier?

MS. WINN: Objection, Your Honor.

THE COURT: What's the basis for the objection?

Q Your Honor, if this is some sort of anonymous tip I'm entitled to find out.

MS. WINN: Who the informant was in this case doesn't go to the officer's probable cause in finding the bike in question on Delmeade Avenue or who the informant in this case isn't relevant.

THE COURT: So how is it relevant?

Q It's relevant if it's an anonymous tip, Your Honor. And if it's an anonymous tip it ought to be with some semblance of reliability. He's trying to claim he's got come probable cause here to go search this motorcycle.

MS. WINN: Your Honor, that's only if it's part of the probable cause. In this instance, the probable cause was found also because Officer Rhodes gained pictured

from Mr. Collins' own Facebook page of the motorcycle in question

[p.34]

that matched the motorcycle that matched the motorcycle from the eluding incident on July 25th.

THE COURT: You have the last word.

Q Your Honor, I believe it's relevant for this issue. It has to do with reliability of the informant. I'm entitled to know who the informant is and whether or not they've been deemed to be reliable.

THE COURT: So the Court agrees with the Commonwealth and is not going to consider that part of the probable cause; that that was information that the officer used may be for other purposes but not as to the probable cause for this search. So the objection is sustained.

Q What was the first date that you developed Mr. Collins as a possible suspect?

A I couldn't tell you the date, I don't know. It was sometime after July 25th. I just don't know the exact date. It was ongoing, you know. When I had time to look at it I did. I was doing other things. It wasn't like I was dedicated to doing that and that only. So I was doing other things in the course of my duty, my daily duty, so I was obtaining information and different things and looking at different things when I could, so I couldn't tell you the exact date. I don't know that.

Q You've had a lot contacts with Mr. Collins in the past, is that right?

[p.35]

A Quite a few, yes.

Q You've been to his house, is that correct?

A I've been to his house, which house?

Q Northfields, Norfields Circle.

A I don't know that I've been to his house. I don't think I've been personally to his house. I've been by his house, yes.

Q Okay. After you discovered or developed him as a suspect did you ever try to make contact with him at his house?

A No, I did not.

Q Never.

A No. I did not.

Q Did you testify in the court below that you did?

A Another officer attempted to make contact. I did not.

Q Okay. Did you testify that you tried to make contact one time?

A I tried to make phone contact with him one time and I did go by his residence and drove by there but there was no vehicles there so I did not make an attempt to contact him, that's correct.

Q And when you drove by---when you drove by there did you ever see an orange and black motorcycle?

[p.36]

A No, I did not.

Q Okay. You testified earlier that the motorcycle being a motor vehicle would be evidence, is that right?

A It's movable, sir.

Q Because it's movable?

A Right.

Q Okay. But it's, but is it, can you explain how the motorcycle sitting in a driveway is evidence of eluding?

MS. WINN: Objection, Your Honor. that is a legal conclusion.

Q Your Honor, he testified that it's going to be evidence. I want to understand why, how that's evidence of being the person that's going to be eluding on July 25th?

THE COURT: So I'm going to overrule the objection. The officer can answer the question.

A The reason I believe it would be evidence in eluding is being able to prove the owner and the operator of the vehicle. If that person lives there and that vehicle is housed there then you then have to develop a suspect in order to try to find who that was that was actually operating that vehicle on that date because I couldn't determine who that was. So I felt that there was evidence enough to determine if that motorcycle was, in fact, that motorcycle was, in fact, that motorcycle that ran from me that day. Whether it's licensed properly, whether it's insured prop-

[p.37]

erly, whether the driver that's operating that was operating the vehicle has got a proper license, whether he's got a motorcycle license or anything like that, that's why I believe it's evidence.

Q But you're discover the true nature of that particular motorcycle that's under the cover, is that right?

A Correct, yeah, right.

Q And the motorcycle itself is not, per se, illegal, it's not contraband or anything like that?

A No, but I think it has criminal investigation to determine the vehicle that just committed a felony it is then deemed to be, it needs to determine whether that vehicle is licensed properly, it's got insurance and all those types of things, that's my opinion.

Q Okay. But it has to do with the felony of eluding.

A That's correct.

Q And you've now examined all that stuff. You found out that it's owned out of New York or stolen out of somewhere and it's not licensed properly yet you still don't have probable cause to charge him eluding, do you?

A No, I don't, you're right, I do not.

Q Okay. The truth is you heard his name on the scanner?

A On the police radio, yes.

[p.38]

Q And you responded because it was Ryan Collins and you wanted to go talk to Ryan Collins?

A That's absolutely correct.

Q Okay. Nothing further at this point, Your Honor.

THE COURT: Redirect?

REDIRECT EXAMINATION

By: Ms. Winn

Q Officer Rhodes, as we mentioned before the photograph that we were talking about from the July 25th eluding, that's a still taken from the video from your car that day and I know that it's fuzzy and still but obviously the video and your recollection provides a more clear picture but, could you tell us if that motorcycle in question has display items on the motorcycle?

A Absolutely, yes.

Q So, was it wasn't just that it was an orange motorcycle it was a very unique distinct orange motorcycle?

A Yes, that's correct.

Q And also, when you went to the house in Delmeade Avenue based on the Facebook pictures, in addition to the fact the house was the same and the fact that the motorcycles silhouette was the same, there were also the cars

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that were in the Facebook photo that were also at the house that day?

A Right, the Facebook photo, one of the photos shows the same vehicle that Mr. Collins was attempting to register at DMV and then the next photo shows the black Acura in the driveway with the motorcycle that I---immediately when I saw the photo knew 100% sure that that was the same motorcycle that had not stopped for me on the Bypass based on looking at it. It was very distinct and I knew, absolutely no question in my mind that was the same motorcycle.

Q (Unintelligible)

RECROSS EXAMINATION

By: Mr. Weber

Q You knew it was the same motorcycle once you took the cover off?

A Right, yes, sir. No, I'm talking about, I'm talking about based on the photograph from the Facebook page that I initially saw---the two Facebook page photos was the silver Acura, the black Acura and then second photo with the black Acura in the driveway with the motorcycle without a cover on it sitting in front of that black Acura which Mr. Collins had told me he had just sold a black Acura a few weeks prior before my contact with him at the DMV. Putting

[p.40]

all that together reasonable suspicion would say that was the motorcycle that was involved.

Q You didn't have permission to go on that property, did you?

A No, I did not.

Q I have no further questions, Your Honor.

THE COURT: Was Defense Exhibit #1 admitted. Did you want that admitted, Mr. Weber.

MR. WEBER: Yes, Your Honor.

THE COURT: I take it there is no objection.

MS. WINN: No, Objections, Your Honor.

THE COURT: So, Defense Exhibit #1 is admitted.

(Defense Exhibit is so duly marked and received into evidence at this time.)

THE COURT: And the questions that I have, I just want to make sure that I'm right about timeframe. This picture which is Defense Exhibit #1, is a picture of the video that you took that night?

A It's a picture of the video from July 25th which was the attempted traffic stop on the Bypass, the very first contact that would have had anything to do with that motorcycle.

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THE COURT: And then Defense Exhibit 1 (they are Commonwealth's Exhibit 1 but Judge says Defense) collectively, these are from Mr. Collin's Facebook page.

A Yes, ma'am, that's correct.

THE COURT: When did you observe these?

A Those were observed on September 10th when I was at the DMV parking lot speaking with Mr. Collins. I wasn't speaking with him exactly when I looked at those but that was the same day.

THE COURT: And this is before you go to his residence?

A That's correct, yes, ma'am.

THE COURT: Did you---did you know whose residence the Delmeade Avenue house was when you arrived there?

A No, I did not. I was not aware.

THE COURT: And Commonwealth's Exhibit #2 is how you found the motorcycle on September the 10?

A Yes, ma'am, that's correct.

THE COURT: And then Commonwealth's Exhibit #3 is what the bike looked like when you pulled off the cover?

A Yes, ma'am.

THE COURT: Thank you. Are there any questions as a result of the Court's questions?

MS. WINN: No, Your Honor.

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THE COURT: Thank you, Officer Rhodes, you may stop down. Further evidence, Ms. Winn?

MS. WINN: No, Your Honor, the Commonwealth rests.

THE COURT: Evidence, Mr. Weber.

MR. WEBER: First of all I call Candace Beach.

THE COURT: Candace Beach. If you'll come forward through the double doors and please remain standing at the witness box and raise your right hand.

CANDACE BEACH, having been so duly sworn, testified as follows:

DIRECT EXAMINATION

By: Mr. Weber

Q If I could have Commonwealth's Exhibit #1 the photographs?

THE COURT: Let me staple those for you.

Q Tell the Court your name please?

A Candace Beach.

Q And where do you live now?

A 2304 Delmeade Lane.

Q And when did you move into Delmeade?

A It was August 8th.

Q August 8th of 2013?

A Yes.

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Q And what is or was your relationship with Ryan Collins at that time?

A We were together. He is the father of my child.

Q Now prior to August 8th where were you living?

A Well back and forth between my house and then his mom's, so 103 Northfields.

Q At his house on Northfields Circle?

A Uh-huh. (Indicating. yes.)

Q Okay and after August the 8th when you moved onto Delmeade did he move in with you or did he spend nights with you or---

A He didn't move in he just stayed the night occasionally, like a couple nights a week.

Q But he was an invited guest to spend the night there?

A Yes.

Q And on September the 10th, the day he got arrested had he spent the night there the night prior?

A Yes.

Q All right. Now I want to show you what the Commonwealth has marked Commonwealth Exhibit 1, I'm going to show you photograph two and ask if you recognize that photograph?

A I do.

[p.44]

Q What is in that photograph?

A There is a streetlight, the edge of a 4-Runner and then a black TL.

Q You call it a TL?

A Well Acura TL.

Q Acura.

A Uh-huh. (Indicating. yes.)

Q Okay. And how long was that Acura actually at your house?

A Not long because I was the one that actually took him to go buy the car. And then like when we got back to town one of his friends was right away interested in buying it.

Q I mean like one day or---

A Yeah, like a day, yeah.

Q I'm going to show you the other photograph that's part of Commonwealth Exhibit 1 and ask if you recognize that?

A Uh-huh. (Indicating. yes.)

Q What's in that photograph?

A There is a silver Acura TSX and then the 4-Runner and then my roommates Civic which she still currently has.

Q Okay. So this dark car in the driveway here---

A It's a Honda Civic.

[p.45]

Q Okay. It's not the black Acura?

A No.

Q The black Acura was already gone prior to—

A Yeah.

Q Do you know how long the motorcycle that was in that photograph had actually been at your residence prior to September 10th?

A Not long, maybe a week, week and half, max.

THE COURT: I'm sorry, I didn't hear the answer.

A A week, week and a half, max.

THE COURT: The motorcycle.

A Uh-huh. (Indicating. yes.)

Q That's all,

MS. WINN: We have no questions, Your Honor.

THE COURT: You may step down.

A Thank you.

MR. WEBER: Your Honor, I'll call Terry Roberts. I just have a few very brief questions for her.

THE COURT: If you will come forward through the double doors and remain standing and raise your right

hand. Ms. Roberts, I'm going to ask you to please keep your voice up.

MS. ROBERTS: I didn't hear you.

THE COURT: Please keep your voice up.

MS. ROBERTS: Okay.

[p.46]

THE COURT: Thank you.

TERRY ROBERTS, having been so duly sworn, testified as follows:

DIRECT EXAMINATION

By: Mr. Weber

Q Tell the Court your name, please.

A Terry Lynn Robert.

Q And where do you live?

A 103 Norfields Circle, Charlottesville.

Q And is that in Albemarle County.

A Yes.

Q And do you know the defendant, Ryan Collins.

A He's my son.

Q And on---I want to go back to June 4th of 2013.

A Uh-huh. (Indicating. yes.)

Q Were you living at Northfields Circle?

A Yes.

Q Who was living in that house with you at that time?

A Ryan, my other son, Bryan, Candy and my granddaughter.

[p.47]

Q Okay. On June the 4th was there an event that sticks out in your mind as something that happened on that day?

A Well Ryan had trial on June 4th.

Q Had trial where?

A In Albemarle County.

Q In Albemarle County or the City of Charlottesville?

A The city, sorry, the city, sorry.

Q And did he appear in Court on that day?

A Yes, he did.

Q And did you appear with him?

A Yes.

Q And what happened as a result of that hearing in court.

A He was released from house arrest and charges were---

Q So up until June the 4th he was on house arrest.

A Yes, he was home incarcerated.

Q He had a bracelet on?

A Yes, he had an ankle bracelet.

Q Okay, and on June the 4th the Judge released him of that obligation, is that right?

A That's correct.

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Q The case got continued?

A Continued and he was released from house arrest.

Q And how did you have to go about getting him off of house arrest?

A Ryan had to report to Staunton within the next 28 to 48 hours, 24 to 48 hours to be released.

Q So when was he physically removed? Was it that day or the next day?

A No, it wasn't the 4th, it was the next following day.

Q Okay, so on June the 4th he was still on house arrest?

A Yes, he was on house arrest.

Q Did he own a motorcycle at that point?

A No.

Q No further questions, Your Honor.

THE COURT: Cross examination.

MS. WINN: The Commonwealth doesn't have any questions, Your Honor.

THE COURT: Thank you, Ms. Roberts, you may step down. Further evidence, Mr. Weber? Any rebuttal, Ms. Winn?

MS. WINN: No, You Honor?

THE COURT: So argument, Mr. Weber, your motion, you are heard first and last.

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MR. WEBER: Yes, Your Honor, the legal issue here is fairly straight forward and the two cases that are on point are, we have on point are United States v. Jones and Florida v. Jardines and I got a copy for both of you, the Commonwealth and the Court. A brief synopsis here, Your Honor, United States v. Jones is 565. US, don't have a page number but it's a 2012 case. This is the one where the police officers attach a GPS unit to a car and the challenge was whether or not this was in violation of the law. In fact, in that case the police had actually gotten a warrant to attach the GPS unit but it expired in ten days and they attached it on the eleventh day. And the question was even though they might have had probable cause initially with the expired warrant did they have legal cause to go in that car and attach a GPS unit. The interesting part about this whole case, Your Honor, is that it's a case revolving around trespass on the personal property by a police officer. It has nothing to do with what is traditionally been held as a 4th Amendment standard which was reasonable expectation privacy. The Court in that case held that the warrant had expired. The police officer's violated the law by trespassing and attaching the unit to the vehicle and they suppressed all the evidence. So then the next case, Your Honor,

has to do with Florida v. Jardines and this as to do with a case where the police had gotten a tip, some sort of anonymous

[p.50]

tip that the occupant of the house may have been dealing drugs, they observed the house, didn't see anything. They called the drug detective dog. They brought the drug detective dog up under the house and the dog alerted and then they subsequently got a search warrant and found marijuana in the house and a number of other things. And the question was whether or not the entry with the dog for purposes of search was a trespass. Whether it violated the 4th Amendment and the Court held that it did. Again, this is a case where they said that the reasonable expectation of privacy is not---is not an issue. The home and the curtilage around the home are protected areas and that the officers may not enter that area for the purposes of doing a search without a warrant. Cold heart, cold heart facts. In this case, Officer Rhodes did exactly that. He entered the residence. He didn't know who lived there. He didn't get permission to enter it. When he subsequently determined that Mr. Collins, although he was not the lessee of the place he was an overnight guest and had been an overnight guest that night and he's got standing to challenge any trespass on that property as a result of this. There's, again, I would argue that even in this case he trespassed, but there's not even a probable cause to do that. He's got the silhouette of a motorcycle that he thinks may have been involved in an earlier incident, two earlier incidents, by the way, from June '04 and

[p.51]

July the 25th. We've got no evidence that that same motorcycle was the one that was involved. We certainly don't have any evidence that Mr. Collins was the one even driving the vehicle on that day. In fact, you heard the officer testify he ran the tag and the tag number was different than the one that was on the motorcycle and came back to an Eric Jones. Eric Jones had had vehicle for several years or at least had that tag for several years. We know that somebody eluded the police on June the 4th. Somebody eluded the police on July 25th, but even with all the evidence that he's gained as a result of trespassing on the property there is still no probable cause to charge, to suspect Mr. Collins of eluding on July the 25th. That's what the purpose of the search was for was to evidence of eluding. We still don't have that in spite of the fact that he's got some---our argument is he's has no valid reason to suspect that Mr. Collins was the one that was guilty of the eluding. He had no probable cause to enter. He had no search warrant. He didn't have permission to do so and therefore it was a violation of the law. The cases that were cited by the Commonwealth in their brief were just not even close to being on point. They cite Ellis v. United States. It's a 1996. And again it just got a general proposition that probable cause where there's evidence of a crime or contraband. You know motorcycles like that can be found anywhere. The motorcycle

[p.52]

itself is not evidence of eluding. That was the point. Even after looking at the motorcycle and getting all the identifying---he still has no probable cause to suspect

that that motorcycle and that Mr. Collins was the one that did the eluding. In this case there is neither evidence of a crime or are the crime for which he was trying to investigate nor is it contraband. So I would just argue that there is no probable cause here. Carroll v. United States is the one that the cited from 1925. That has to do with the automobile exception to the warrant. But that is just not even applicable here. What we're really talking about here is trespassing on real property. Trespassing on the curtilage of a home for the purposes of doing investigation. I would conclude that Officer Rhodes violated the law in trespassing on private property. It was for the purpose of the search. He has no probable cause to do so. He certainly had no exigent circumstances. And any information that he gained as a result of that illegal trespass (unintelligible) including VIN number, description of the motorcycle that was there and the motorcycle itself. Thank you, very much.

THE COURT: Before you sit down I may one question if I'm recalling the right Jones case. But with regards to Jones, didn't the Court find that the government had forfeited their argument on probable cause so they didn't address the argument on probable cause and I'm reading from

[p.53]

the opinion, the government argues in the alternative that even if the attachment (unintelligible) device was a search it was reasonable and thus lawful under the 4th Amendment because officers had reasonable suspicion and indeed probable cause to believe Jones was the leader. We have no occasion to consider this argument. The government did not raise it below and

the circuit court did not address it. We consider that argument to be forfeited. How does that impact this Court's analysis?

MR. WEBER: Well it impacts because the argument is probable cause to believe that he committed the eluding nor is there probable cause that this particular was being driven by Mr. Collins on July 25th. All of this is occurring on September 10th. The photographs from the Facebook page were September 10th. This is Delmeade evidence of September 10th. It's all done on September 10th which is some month and a half after the July 25th date. So I'm arguing that there is no probable cause. That---I'm also relying on not just the Jones case but the other case that I cited, the Reaves case which talks about the tip and the going into the curtilage of the home for the purposes of a search. That that case is even more on point than Jones so I think that the fact is the officer didn't have probable cause to search that motorcycle. He had plenty of alternatives. He could have gotten search warrant perhaps. But the magistrate

[p.54]

might have said tell me why that's evidence of eluding on July 25th. Maybe he just thought he couldn't get the search warrant. I don't know, Your Honor, but the fact is, he didn't, but trespassing on private property for the purposes of the search and got the information subsequent to that that vehicle was, in fact, reported stolen had nothing to do with eluding which was the reason for the, which he's claiming is the reason for the search in the first place.

THE COURT: Thank you. What say you, Ms. Winn?

MS. WINN: Your Honor, while there is a Constitutional 4th Amendment action against a reasonable search and seizure; Mr. Collins' arguments are misguided. The search that Officer Rhodes conducted of the orange motorcycle September 10th, 2013 was reasonable and lawful. The Supreme Court has long recognized an automobile exception to the traditional requirement of probable cause in a warrant. In Carroll v. United States the Court concluded that automobiles were readably mobile and therefore easy (unintelligible) moved from a jurisdiction. Probable cause alone is enough to justify a search and a warrant is unnecessary. The Supreme Court confirmed this in Maryland v. Dyson in 2013 and the (unintelligible) is 527, US 465, where they explicitly ruled that warrantless search of a vehicle that was in a private driveway was lawful within the 4th amendment and the Carroll Doctrine applied to that. Mr. Collins' arguments about Jones and Jardines are both off point. In Jones, the Court said that the government did not argue Carroll, so the Court considered it waived the doctrine wasn't an issue. In Jardines it was about (unintelligible) the motorcycle (unintelligible) and the Carroll Doctrine should apply. And on September 10th Officer Rhodes did have criminal probable cause for several reasons. One, he'd seen the picture of a motorcycle in front of the house on Mr. Collins Facebook page. That wasn't Eric Jones Facebook page or anyone else's. And in that same picture was the car that Mr. Collins was trying to register at the DMV that day. Officer Rhodes saw that the house on the Facebook photograph was on Delmeade Avenue. When Officer Rhodes approached and knocked on the door of the house Mr. Collins answered. Two, the motorcycle that Officer Rhodes was looking for was unusual. It has

an extended sway arm that made the motorcycle (unintelligible) longer than a standard bike and it had chrome wheels. Both of these components were described by Officer Rhodes and being unique and uncommon (unintelligible) motorcycles. Furthermore, you can tell that the photographs, that in the photographs of the motorcycle from Mr. Collins' Facebook page, the motorcycle is in the same exact place as it was on Delmeade Avenue that day on September 10th. The 4-Runner was in front of it and it was beside the brick wall. When Officer Rhodes approached the house from the

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public sidewalk he did see the motorcycle partially covered from the tarp. From the position he could see that it had the same chrome wheels and it was longer than a standard bike. Furthermore, the motorcycle in question is stolen property so Mr. Collins can't object to the seizure of it, which, the only thing that he can object to is the probable cause itself which Maryland does include---covers because the Court said that it was a case, it was a common entrance to a private driveway if there is probable cause which Officer Rhodes had that day. Because Officer Rhodes had sufficient probable cause he did not need to have warrant. The removal of the tarp covering the motorcycle was lawful under the 4th Amendment and the information gained from the removal should not be suppressed. Thank you.

THE COURT: Mr. Weber, Rebuttal.

MR. WEBER: Your Honor, the automobile exception to my understanding is the search of the automobile not a search for an automobile. That's going to be the

search for this time that was going on private real estate, personal home to search for the vehicle, not the search of the vehicle. Automobile exception was created for officers on the street when they stop somebody and they know there is going to be maybe contraband in the vehicle and it's an exception to a warrant requirement. That exception does not apply in this case. That vehicle was parked in a private driveway.

[p.57]

He had the capacity to get Officer---He certainly had to capacity to send Officer McCall to Jarman's to get the receipts. He could have sent Officer McCall to try to get a search warrant at that point and if Mr. Collins coming out of the place (unintelligible) at that point. So I would argue that the automobile exception just doesn't apply here. The question is whether he had probable cause. I'd argue that he didn't, but even if the Court finds that based upon a silhouette, based upon a, you know, little bit of chrome on there and based upon some statements made at DMV that that's sufficient probable cause, there's no exigent circumstances here. I would still argue that even with probable cause he's got get---got to get a warrant. He's trespassing on property for the purposes of doing a search. He's got no exigent circumstances. He's got no---I would argue no probable cause. Because even with the information he was able to glean from the motorcycle he still has no probable cause to charge him with a crime of eluding. So this is where we are. I think it all ought to be suppressed, Your Honor. Thank you.

THE COURT: So the Court is going to take about a ten minute recess.

(Recess)

THE COURT: Se we are back on the record in the case of Commonwealth v. Ryan Collins. Mr. Collins is in the

[p.58]

courtroom with his counsel, Mr. Weber. Ms. Winn and Mr. Casey are here on behalf of the Commonwealth. And here is the ruling of the Court. So I think the distinction that the defense is making is as he stated that the officer is not searching in the vehicle, he is searching for the vehicle. And Carroll obviously established that a search in a vehicle can be established when there is probable cause if that is where the evidence will be. In this case the issue is what needs to be determined to search for the vehicle. I looked at the Florida Hardines case that was cited by the defense and I don't think it's applicable---in terms of the facts. That was the search that involved a drug dog. And the issue seemed to be having something like a dog or I think there was mention of the heat activated devices that can look into homes using something other than somebody walking up to the door and how far that would go in terms of being permitted when a person is allowed under the 4th Amendment to be free from unreasonable government intrusion. But while I don't find the facts to be similar, I find the issue to be similar and that is what is a reasonable e~pectation of privacy. The 4th Amendment protects the right of man to be free from unreasonable governmental intrusions. So in examining this case the Court finds that the testimony is of the officer is that he pulls up the pictures from Mr. Collins Facebook

page. When he shows Mr. Collins the pictures, Mr. Collins

[p.59]

says he doesn't know anything about the motorcycle and he doesn't know anything about the residence. And the Court finds there is a reasonable inference of why someone would post on their Facebook picture a residence that he doesn't know anything about and a picture of a motorcycle that he doesn't know anything about. And the Court would note that the motorcycle is clearly a view in the picture. In addition he said that it had been a long time since he had ridden the motorcycle which the Court would say reasonably infers he doesn't have a personal interest in this particular motorcycle. In this case the officer described the motorcycle that he saw that night as being unique. It was extended. It had the chrome wheels. He described the colors as being black. And I think he said it was a Suzuki. There was Kawasaki mentioned but I think it corrected it and said it was a Suzuki. And that when he was looking at this picture that the motorcycle that is shown in Commonwealth's Exhibit 1 met all the characteristics, was almost identical to the bike that he saw on that occasion of July---of the July when the eluding occurred. The Court will note when looking at Commonwealth's Exhibit #2 that the bicycle is in the exact same position or appears to be almost identical position as it is in Commonwealth's Exhibit #1. It appears to be about the same size, turned in the same way. The officer indicated that it was a longer type of motorcycle. He could

[p.60]

tell even when it was covered. It does appear to be while it's in driveway and the bike itself is covered that it's location does not appear to be particularly covered the Court cannot specifically but it does appear that it can be seen from a sidewalk. In noting that the sidewalk is shown in Commonwealth's Exhibit #1 as well as the silver vehicle that's shown and clearly you can see those even from away from away from the sidewalk. So the Court finds that where this is a---where this is in a area where it is exposed to the public where the officer asked Mr. Collins about the motorcycle and he indicated he didn't know anything about it, where it's in the exact same location, where it matches the chrome wheels, the Court finds that there was probable cause for the search and therefore it was not an unreasonable governmental intrusion. The Court is going to deny the motion to suppress. Your exception to the Court's ruling is noted. Is there anything further the Court needs to address today?

MS. WINN: No, Your Honor

THE COURT: Mr. Weber.

MR. WEBER: Note the exception, Your Honor.

THE COURT: It's been so noted. Do we need to set the matter for trial?

MR. CASEY: We have a trial date next week.

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THE COURT: Okay. Mr. Collins has been recognized in writing?

MR. CASEY: I believe so, Your Honor.

MR. WEBER: Your Honor, Just to make sure we're all on the same page. Two trials scheduled next week. They should be back to back trials.

MR. CASEY: I'm not sure if I understand what you're saying.

MR. WEBER: Two charges.

MR. CASEY: Right.

MR. WEBER: There's a charge for stealing stolen property and there's a charge that has to do with the title with DMV and I'd ask that those charges be tried separately. But we can try them back to back on the same day.

MR. CASEY: Oh.

MR. WEBER: I want make sure that that was the understanding.

MR. CASEY: It is not.

THE COURT: Oh, I see, in the afternoon, correct. That would be fine. Thank you. So the Court does confirm that Mr. Collins has been recognized in writing so you are free to go, thank you.

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STATE OF VIRGINIA AT LARGE:

I, Deborah L. Lawrence, Notary Public in and for the State of Virginia at Large, having been so duly commissioned and qualified, do certify that the foregoing court proceeding were so duly taken by

Brittany Herring at the time and place specified in the caption hereof, said witness having been so duly sworn.

I do further certify that said hearing was correctly taken by me by mechanical methods and that the same was accurately written out in full and transcribed into the English language by me and that said transcript is a true, accurate and correct record of the testimony by said witness.

I further certify that I am neither attorney nor counsel for or related to or employed by any of the parties to the action in which this hearing was taken and, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in this action.

My commission expires July 31, 2014.

Given under my hand and seal this 6th day of May. 2014.

/s/ Deborah Lawrence
Notary Public - 2261057

APPENDIX D

Virginia:
IN THE CIRCUIT COURT FOR THE COUNTY OF ALBERMARLE

December 2, 2013 TERM

THE GRAND JURY CHARGES THAT, in the County of Albemarle **RYAN AUSTIN COLLINS** did unlawfully and feloniously

On or about September 10, 2013, buy or receive stolen property, having a value of $200.00 or more, belonging to another, knowing at the time of receipt that the property had been stolen, in violation of §§ 18.2-108; § 18.2-95 of the Code of Virginia (1950) as amended.

VCC CODE: LAR-2808-F9

Docket Number:

Grand Jury Witness: David W. Rhodes
Albemarle County Police Department

A True Bill /s/_____
Foreman of the Grand Jury

Not A True Bill _____
Foreman of the Grand Jury

APPENDIX E

SUPREME COURT OF VIRGINIA

Record No. 151277
Court of Appeals No. 1096-14-2

[Filed November 22, 2016]

Ryan Austin Collins,	)
Appellant,	)
	)
against	)
	)
Commonwealth of Virginia,	)
Appellee.	)
	)

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 15th day of September, 2016 and grant a rehearing thereof, the prayer of the said petition is denied.

Justice McCullough took no part in the consideration of this case.

A Copy,

Teste:

Patricia L. Harrington, Clerk

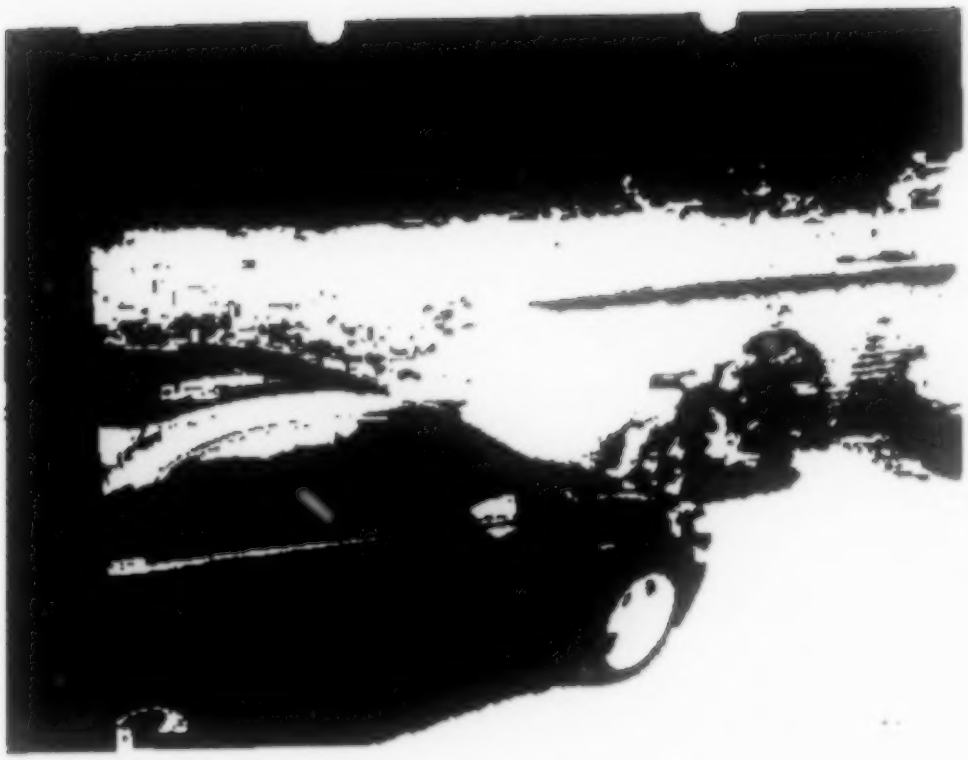
By: /s/_____

Deputy Clerk

APPENDIX F

Commonwealth's Exhibits Admitted at April 30, 2014 Hearing

Exhibits 1-3



APPENDIX G

Defendant's Exhibit Admitted at April 30, 2014 Hearing

Exhibit 1

RECORD AND BRIEFS

No. 16-1027

FILED
JUN - 7 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

RYAN AUSTIN COLLINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF IN OPPOSITION

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June 7, 2017

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QUESTION PRESENTED

Whether the Fourth Amendment's automobile exception allows a warrantless daytime inspection of a motorcycle's vehicle identification number and license plate, when the motorcycle is parked in the defendant's driveway, adjacent to the steps leading to the front door of the house, and when the officer has probable cause to believe that the motorcycle is stolen and has twice been used to elude police.

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IN THE SUPREME COURT OF THE UNITED STATES

RYAN AUSTIN COLLINS, PETITIONER,

v.

COMMONWEALTH OF VIRGINIA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

1. On May 7, 2014, the Circuit Court of Albemarle County, Virginia convicted petitioner Ryan Collins of one felony count of buying or receiving stolen property, a 2008 Suzuki motorcycle. The conviction was affirmed by the Virginia Court of Appeals and by the Supreme Court of Virginia. Collins seeks to invalidate his conviction on the ground that the trial court erred in denying his motion to suppress evidence obtained when Albemarle County police officer David Rhodes pulled back a tarp that covered the motorcycle in order to read the license plate and vehicle identification

number (VIN) on the vehicle's exterior. The facts summarized below are taken from the preliminary hearing, suppression hearing, and trial transcripts.[1]

Officer Rhodes had been investigating Collins because he suspected that Collins was the motorcycle driver who had eluded him on July 25, 2013. Rhodes was driving on the highway in his unmarked cruiser when an orange and black Suzuki motorcycle approached from behind "at a very high rate of speed." Rhodes activated his rear radar and clocked the motorcycle at 100 mph in a posted 55-mph zone. As Rhodes turned on his emergency lights, the motorcycle passed by him and sped away. Rhodes initiated pursuit but stopped the chase out of safety concerns when the motorcycle reached speeds exceeding 140 mph.[2] Rhodes was able to jot down the license-plate number and his

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[1] The transcripts were included in the Joint Appendix in the Supreme Court of Virginia ("Va.-JA __"). Only the transcript of the suppression hearing was reproduced in the appendix to the petition for writ of certiorari. *See* Pet. App. 50. In reviewing a trial court's ruling on a suppression motion, however, "federal courts have held uniformly that an appellate tribunal may consider evidence adduced at trial that supports the district judge's ruling." *United States v. Han*, 74 F.3d 537, 539 (4th Cir. 1996) (citing, *inter alia*, *Carroll v. United States*, 267 U.S. 132, 162 (1925)). Virginia courts follow that principle as well. *See, e.g.*, *Commonwealth v. White*, No. 160879, 2017 WL 2378798, at *1 (Va. June 1, 2017) ("When considering whether to affirm the denial of a pretrial suppression motion, an appellate court reviews not only the evidence presented at the pretrial hearing but also the evidence later presented at trial.").

[2] Pet. App. 66-67, 70-71.

dash camera recorded images of the motorcycle, a still photograph of which was admitted into evidence.[3]

Rhodes testified that the orange and black motorcycle was "very unique."[4] It had a "'stretched out' rear wheel, indicating that it had been modified for drag racing."[5] It also had chrome accents and chrome wheels.[6] Rhodes explained that "it didn't look like a conventional motorcycle."[7] It was "[n]ot something you'd normally see driving down the roadway and not something you can buy from the factory either. So that's a customized type motorcycle."[8]

The tag number led Rhodes to Eric Jones, who revealed that he had sold the motorcycle to Collins.[9] Jones admitted that he knew the motorcycle lacked a title certificate and was stolen.[10] Jones also told Rhodes that he had informed Collins that the motorcycle was stolen.[11] Officer Rhodes drove by the house

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[3] *See* Pet. App. 71-72, 79. The photograph of the eluding motorcycle is reproduced at Pet. App. 116.

[4] Pet. App. 86. *See also* Pet. App. 57.

[5] Pet. App. 3. *See also* Pet. App. 57.

[6] Pet. App. 34, 57.

[7] Pet. App. 57.

[8] Pet. App. 57-58.

[9] Pet. App. 78-80.

[10] Va. JA 140:8-141:4.

[11] At trial, Jones was not sure if he had told Collins that the motorcycle was stolen, something he assumed was evident from the lack of title. But Jones admitted that he *had told Officer*

where he believed Collins lived with his mother, but Rhodes did not find Collins there and did not see the motorcycle.[12]

On September 10, 2013, however, Officer Rhodes heard Collins's name mentioned on his police radio in connection with an incident at the DMV.[13] When Rhodes arrived at the DMV, Collins was already being interrogated by Officer McCall, who was investigating Collins as a suspect in a different motorcycle-eluding incident—also involving an orange and black motorcycle with an extended frame—that occurred on June 4, 2013.[14] Collins denied to both officers that he owned a motorcycle and denied involvement in any eluding.[15]

As Officer McCall questioned Collins, Officer Rhodes was able to access Collins's Facebook page, where Collins had posted several incriminating pictures. The photographs depicted a brick home with a driveway on the left side and a "clearly visible" orange and black motorcycle, resembling the one that had eluded Rhodes, parked in the driveway in between two other vehicles. (The Facebook photographs are reproduced at Pet. App. 112-13.)[16] Rhodes testified that, as

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Rhodes that he had informed Collins that the motorcycle was stolen. *See* Va.-JA 156:22-157:25. By omitting that fact, petitioner's amicus mischaracterizes the record. U.S. Justice Found. Br. 4.

[12] Pet. App. 83-84.

[13] Pet. App. 54.

[14] Pet. App. 72-73; Va.-JA 166:8-23, 189:6-22.

[15] Pet. App. 58, 74.

[16] *See* Pet. App. 56-57.

soon as he saw the Facebook photograph of the motorcycle, he was "100% sure" it was the same one that had eluded him.[17]

Rhodes used his smartphone to photograph the Facebook pictures and then returned to question Collins about them.[18] Collins denied knowing anything about the motorcycle or the house in the photographs; he claimed he had not ridden a motorcycle in a few months.[19] Collins then left the DMV, and Rhodes saw him get into a car with a male driver and female passenger.[20]

Officer Rhodes received a tip that Collins had taken a motorcycle very recently to a shop to have new tires installed. Rhodes asked Officer McCall to investigate that lead.[21]

In the meantime, Rhodes learned from an informant that the house in Collins's Facebook pictures was on Delmeade Avenue. Shortly after Collins left the DMV, Rhodes drove to Delmeade Avenue and quickly located the property in the photographs.[22] Unbeknown

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[17] Va.-JA 100:7-8.

[18] Pet. App. 54-55, 74.

[19] Pet. App. 59; Va.-JA 175:15-176:6.

[20] Va.-JA 18:17-23.

[21] Pet. App. 62.

[22] Pet. App. 58-60; Va.-JA 70:17-21, 71:11-16, 72:1-7.

to Rhodes, the Delmeade property was home to Collins's girlfriend (and the mother of Collins's child); Collins stayed there several nights a week.[23]

When Rhodes arrived at the Delmeade property, he observed a motorcycle, covered in a white tarp, parked in the driveway, "plainly" visible from the roadway.[24] No one was present at the residence.[25] The covered motorcycle had the same silhouette as the stretched-out motorcycle Rhodes was looking for, and he could also see a chrome wheel that was not fully covered by the tarp.[26] While standing on the sidewalk, Rhodes took a photograph of the covered motorcycle. *See* Pet. App. 114.[27] The motorcycle was "a car length or two" into the driveway.[28] It was parked against the retaining wall, near the steps leading up from the driveway to the front door of the house.[29] It was in the same position depicted in the Facebook photograph.[30]

After photographing the vehicle from the sidewalk, Officer Rhodes walked up the driveway and pulled back the tarp to read the motorcycle's license plate and VIN.[31] He confirmed that the motorcycle was

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[23] Pet. App. 89-91.

[24] Pet. App. 60.

[25] Va.-JA 18:13.

[26] Pet. App. 60; Va.-JA 90:8-14.

[27] Pet. App. 60-61; Va.-JA 179:17-19.

[28] Pet. App. 77.

[29] Pet. App. 114.

[30] Va.-JA 120.

[31] Va.-JA 179:19-22.

the same one involved in the July 25 eluding incident.[32] Rhodes then ran the VIN and learned that the motorcycle had been stolen in New York.[33] The license plate had also been changed from the tag he had seen on July 25; the new tag was registered to a Kawasaki motorcycle, not a Suzuki.[34] Rhodes then photographed the uncovered motorcycle, *see* Pet. App. 115, and replaced the tarp.[35]

Rhodes returned to his vehicle to surveil the property, anticipating Collins's imminent arrival.[36] A short time later, a car drove by that Rhodes recognized as the same one that Collins had stepped into when leaving the DMV, but Collins was not in it.[37]

Rhodes walked up the driveway and knocked on the front door of the home; Collins came to the door.[38] Collins had changed clothes from the shorts and flip-flops he had worn at the DMV. Now he was dressed in motorcycle-appropriate attire. Despite that the temperature outside exceeded 90 degrees, Collins had donned jeans, a long-sleeved shirt, and Timberland-type boots, "the same exact boots that the rider was wearing" on July 25.[39]

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[32] Va.-JA 180:16-17. *See also* Pet. App. 67, 87.

[33] Pet. App. 68.

[34] Pet. App. 62.

[35] Pet. App. 89.

[36] Va.-JA 18:15-17.

[37] Va.-JA 18:17-23.

[38] Pet. App. 64.

[39] Pet. App. 65, 67; Va.-JA 182:16-24.

Collins agreed to speak with Rhodes. He initially claimed to know nothing about the motorcycle; then he said it belonged to a friend.[40] As Rhodes questioned Collins, Officer McCall arrived with an invoice from the shop that showed that Collins had purchased new tires for the motorcycle eight days before.[41] Collins then admitted that he had ridden it from his mother's house to the shop to have new tires put on.[42] Upon further questioning, Collins finally admitted to having purchased the motorcycle from Jones.[43]

Officer Rhodes thereupon placed Collins under arrest for receiving stolen property.[44] In a search incident to arrest, Rhodes discovered the motorcycle key in Collins's pocket.[45]

The trial court overruled Collins's motion to suppress the evidence of the tag and VIN obtained when Rhodes looked under the tarp.[46] Collins went to trial, was convicted of receiving stolen property, and was sentenced to three years in prison with all but two months suspended (time already served).[47]

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[40] Pet. App. 64-65.

[41] Pet. App. 63-64; Va. JA 128.

[42] Pet. App. 65.

[43] Pet. App. 68.

[44] Pet. App. 65-66.

[45] Pet. App. 66.

[46] Pet. App. 107.

[47] Va. JA 269-70. *See* Va. Code Ann. § 18.2-108(A) (2014) ("If any person buys or receives from another person, or aids in concealing, any stolen goods or other thing, knowing the same to have

2. Collins appealed the trial court's decision denying his suppression motion, and the Virginia Court of Appeals affirmed.[48] The Court of Appeals found the record insufficient to enable it to determine if the covered motorcycle was within the curtilage of the home.[49] Even assuming it was within the curtilage, the court found that "numerous exigencies justified both [Rhodes's] entry onto the property and his moving the tarp to view the motorcycle and record its identification number."[50] In particular, a reasonable officer could believe that the motorcycle could be easily moved, particularly in light of the prior eluding episodes.[51] Moreover, Officer Rhodes knew that Collins was aware that he was being investigated and that the police had Collins's own photographs showing the orange and black motorcycle in the driveway.[52] The fact that the motorcycle had been placed under a tarp was also consistent with an intent to conceal it.[53] Accordingly, the court found the search lawful and that it "need not rely on the automobile exception, for exigencies existed aside from the inherent mobility of the motorcycle."[54]

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been stolen, he shall be deemed guilty of larceny thereof, and may be proceeded against, although the principal offender is not convicted.").

[48] Pet. App. 32-33.

[49] Pet. App. 41.

[50] *Id.*

[51] Pet. App. 42.

[52] *Id.*

[53] *Id.*

[54] Pet. App. 44 n.4.

The Supreme Court of Virginia affirmed, though on a different ground: it concluded that "the facts necessary to resolve this case under the automobile exception to the warrant requirement of the Fourth Amendment were established in the record before the trial court. Therefore, Officer Rhodes' search of the motorcycle was justified. . . ."[55]

Justice Mims dissented. He concluded that Officer Rhodes needed a warrant before looking under the tarp.[56] Like the majority, the dissent did "not address the question of whether the part of the driveway where the motorcycle was parked . . . was curtilage or open field for Fourth Amendment purposes."[57] That did not matter because, in the dissent's view, "[s]earching the tarp without a warrant was unconstitutional even if the area where the motorcycle was parked is considered to be open field."[58]

Collins filed a timely petition for a writ of certiorari.

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[55] Pet. App. 26.

[56] Pet. App. 30-31 (Mims, J., dissenting).

[57] Pet. App. 30 n.4.

[58] *Id.*

REASONS FOR DENYING THE PETITION

I. The Virginia Supreme Court correctly held that the automobile exception applies when the vehicle is located in a driveway, is visible from the street, and is readily mobile.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[59] That protection "generally requires police to secure a warrant before conducting a search."[60]

There are several exceptions to the warrant requirement, however. "One well-recognized exception . . . applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment."[61] The Virginia Court of Appeals applied that exception to hold that Rhodes's inspection of the VIN and tag number was supported by both probable cause and exigent circumstances.[62]

Another long-standing exception is the "automobile exception," which this Court "recognized nearly [92] years ago in *Carroll v. United States*, 267 U.S. 132, 153 (1925)."[63] "'If a car is readily mobile and probable cause exists to believe it contains contraband, the

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[59] U.S. Const. amend. IV.

[60] *Maryland v. Dyson*, 527 U.S. 465, 466 (1999) (per curiam).

[61] *Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013) (quoting *Kentucky v. King*, 563 U.S. 452, 460 (2011)).

[62] Pet. App. 39-44.

[63] *Dyson*, 527 U.S. at 466.

Fourth Amendment . . . permits police to search the vehicle without more.'"[64] As this Court made clear in *Maryland v. Dyson*, "under our established precedent, the 'automobile exception' has no separate exigency requirement."[65]

As shown below, the Supreme Court of Virginia correctly applied the automobile exception here: Rhodes had probable cause to believe that the motorcycle was stolen and had been twice used to elude police; and despite being under a tarp, the motorcycle was readily mobile, parked in a driveway with easy access to the street.

A. The automobile exception applies because Officer Rhodes had probable cause to believe that the motorcycle was stolen and had been used to elude police.

The Court in *Carroll* "recognized that the privacy interests in an automobile are constitutionally protected; however, it held that the ready mobility of the automobile justifies a lesser degree of protection of those interests."[66] This Court elaborated on that mobility rationale in *Carney*, explaining that the automobile exception was a categorical rule based on the inherent exigency that the vehicle could be readily moved:

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[64] *Id.* (quoting *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (per curiam)).

[65] *Id.* (discussing *United States v. Ross*, 456 U.S. 798, 809 (1982), and *Labron*, 518 U.S. at 940).

[66] *California v. Carney*, 471 U.S. 386, 390 (1985).

> The capacity to be "quickly moved" was clearly the basis of the holding in *Carroll*, and our cases have consistently recognized ready mobility as one of the principal bases of the automobile exception. In *Chambers* [*v. Maroney*, 399 U.S. 42 (1970)], for example, commenting on the rationale for the vehicle exception, we noted that "the opportunity to search is fleeting since a car is readily movable." 399 U.S., at 51. More recently, in *United States v. Ross*, 456 U.S. 798, 806 (1982), we once again emphasized that "an immediate intrusion is necessary" because of "the nature of an automobile in transit. . . ." The mobility of automobiles, we have observed, "creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible." *South Dakota v. Opperman*, [428 U.S. 364, 367 (1976)].[67]

Carney added, however, that while "ready mobility alone was perhaps the original justification for the vehicle exception," later cases established a second justification: " 'less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office.' "[68] That reduced expectation of privacy derives "from the pervasive regulation of vehicles capable of traveling on the public highways."[69]

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[67] *Id.* at 390-91 (some citations omitted).

[68] *Id.* at 391 (quoting *Opperman*, 428 U.S. at 367).

[69] *Id.* at 392.

"The public is fully aware that it is accorded less privacy in its automobiles because of this compelling governmental need for regulation."[70]

Indeed, in *New York v. Class*, the Court made clear that the VIN on a vehicle is subject to *no* reasonable expectation of privacy whatsoever: "In light of the important interests served by the VIN, the Federal and State Governments are amply justified in making it a part of the web of pervasive regulation that surrounds the automobile, and in requiring its placement in an area ordinarily in plain view from outside the passenger compartment."[71] Accordingly, *Class* held that the locations on a vehicle where the VIN is required to be displayed are categorically not subject to a reasonable expectation of privacy for Fourth Amendment purposes.[72]

The automobile exception plainly applies here. Officer Rhodes had probable cause to believe that the motorcycle in the driveway was stolen and had been used twice to elude police. Rhodes knew that Eric Jones had sold the stolen vehicle to Collins. The motorcycle had unique features, particularly its swept-back rear wheel. When he saw the motorcycle in the picture on Collins's Facebook page, Rhodes was "100% sure" it was the same one in the eluding incident. (It is a felony to disregard a signal by a law-enforcement officer to stop and to elude police in a manner that endangers

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[70] *Id.*

[71] 475 U.S. 106, 112 (1986).

[72] *Id.* at 114.

any person.[73]) When Rhodes found the residence depicted in Collins's Facebook pictures, the motorcycle was covered with a tarp, but it was parked in the same place as in the photo, it had the distinctive silhouette of the vehicle in question, and Rhodes recognized a chrome wheel peeking out at the bottom.[74]

Indeed, petitioner does not contend that probable cause was lacking. Nor does he adopt the argument of the lone dissenting justice below that there is some meaningful difference between a search *of* the motorcycle and the search *for* the motorcycle.[75] The motorcycle itself was clearly the instrumentality of the crime of eluding and the contraband involved in the crime of receiving stolen property.[76]

Moreover, the motorcycle was readily mobile, notwithstanding the tarp. The tarp could be removed and the motorcycle kicked into gear within seconds. The motorcycle had been used to elude police at speeds exceeding 140 mph. Collins had just installed fresh tires.

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[73] Va. Code Ann. § 46.2-817(B) (2014).

[74] *See supra* at 6.

[75] Pet. App. 27 (Mims, J., dissenting).

[76] *See Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 221 (1968) (stating that the automobile exception applies when "the officers conducting the search have 'reasonable or probable cause' to believe that they will find the instrumentality of a crime or evidence pertaining to a crime"); *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 310 (1967) ("The Fourth Amendment allows intrusions upon privacy under these circumstances, and there is no viable reason to distinguish intrusions to secure 'mere evidence' from intrusions to secure fruits, instrumentalities, or contraband.").

The vehicle was located in the driveway, with ready access to the street.[77] And in any case, the automobile exception turns on the inherent mobility of a vehicle; it does *not* "depend upon a reviewing court's assessment of the likelihood in each particular case that the [vehicle] would have been driven away . . . during the period required for the police to obtain a warrant."[78]

B. The motorcycle's presence in the driveway does not defeat the automobile exception because the motorcycle had ready access to the street.

The motorcycle's location in the driveway of the residence makes no constitutional difference. For starters, Collins overlooks that this Court in *Scher v. United States* applied the automobile exception to uphold the warrantless search of a vehicle, tailed by police, that the defendant then drove into his garage, "a few feet back of his residence and *within the curtilage*."[79] The Court held that *Carroll* applied in that situation because "it seems plain enough that just before he entered the garage the following officers properly could have stopped petitioner's car, made search and put him under arrest."[80] *Scher* thus refutes petitioner's incorrect claim that "this Court has always stopped short of

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[77] *See supra* at 2-6.

[78] *Michigan v. Thomas*, 458 U.S. 259, 261 (1982) (per curiam).

[79] 305 U.S. 251, 253 (1938) (emphasis added).

[80] *Id.* at 254-55.

applying [the automobile exception] on private, residential property." Pet. 6.

Moreover, the considerations animating the automobile exception—ready mobility and reduced privacy expectations—apply equally to vehicles like Collins's motorcycle, parked in a driveway with immediate access to the street. *Carney*, for instance, held that the automobile exception applies to vehicles even when they are not on public highways—in that case a motor home parked in a public parking lot. The automobile exception applied there because the "motor home was readily mobile" and "the vehicle was so situated that an objective observer would conclude that it was being used not as a residence, but as a vehicle."[81] The Court left open that the outcome might be different for "a motor home that is situated in a way or place that objectively indicates that it is being used as a residence," such as if it were "elevated on blocks" or "connected to utilities," contrasting that with a motor home that had "convenient access to a public road."[82] Collins's motorcycle fits the required elements of the vehicle exception: it was readily mobile, was obviously not being used as a residence, and had "convenient access to a public road."

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[81] 471 U.S. at 388, 393.

[82] *Id.* at 394 n.3.

Collins mistakenly asserts that the following passage from *Carney* supports his claim that the automobile exception does not apply to vehicles in residential driveways:

> When a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary *in a place not regularly used for residential purposes*—temporary or otherwise—the two justifications for the vehicle exception come into play.[83]

Collins misreads the italicized language to conclude that the automobile exception does not apply to vehicles in residential driveways; he reasons that a residence where the vehicle is parked is a place "regularly used for residential purposes." Pet. 14. But that reading not only conflicts with *Scher*, which applied the automobile exception to a vehicle within the curtilage of a residence; it conflates the *driveway* (which is not regularly used for residential purposes) with the *house* itself (which is).

As Professor LaFave has correctly explained, *Carney*'s reference to "a place not regularly used for residential purposes" applies comfortably "when the vehicle is parked *on the grounds of the residence* where police have some lawful basis for entering that area,"

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[83] *Id.* at 392-93 (emphasis added).

which is different from "when the vehicle is located *inside* private premises (e.g., a garage)."[84] "Given the fact that police may enter upon such commonly-used areas of the curtilage as a driveway in the course of a legitimate investigation, it would seem that a warrantless seizure of a vehicle from such a place is just as proper as it would be were the car parked on the street."[85]

Indeed, courts routinely hold that driveways are subject to a lessened expectation of privacy, particularly when the driveway, as in this case, is plainly visible from the street.[86] For instance, this Court in *Brigham City v. Stuart* upheld the warrantless entry of the home to avert imminent injury *after* the officers had already "proceeded down the driveway to investigate" complaints about a loud party.[87] And "a police officer not armed with a warrant may approach a home

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[84] Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 7.2(b) n.59 (5th ed. 2012 & Supp. 2016) (emphasis added).

[85] *Id.* § 7.3(a).

[86] *See* Mei Fung So, *Search and Seizure: Reasonable Expectation of Privacy in Driveways*, 60 A.L.R. 5th 1, § 2a (1998 & Supp. 2016) ("Even if the driveway was part of the curtilage, the courts often go further to consider whether the driveway was impliedly open to the public; thus, it is a place where the public should be anticipated. . . . Courts have held that there is no reasonable expectation of privacy in areas which are normal access routes to the home that anyone, even police officers, have an implied invitation to use as long as they have legitimate business, including police investigation, and act as reasonably respectful citizens.").

[87] 547 U.S. 398, 401 (2006).

and knock, precisely because that is 'no more than any private citizen might do.' "[88]

State courts have similarly observed that "[i]n the course of urban life, we have come to expect various members of the public to enter upon such a driveway. . . . If one has a reasonable expectation that various members of society may enter the property in their personal or business pursuits, he should find it equally likely that the police will do so."[89] The Supreme Court of Virginia has described this as an "implied consent" that deems "an entry into the curtilage a reasonable intrusion into an area otherwise protected by an expectation of privacy under the Fourth Amendment."[90] As Professor LaFave has summarized: "when the police come on to private property to conduct an investigation or for some other legitimate purpose and restrict their movements to places visitors could be expected to go (e.g., walkways, *driveways*, porches), observations

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[88] *Florida v. Jardines*, 133 S. Ct. 1409, 1416 (2013) (quoting *King*, 563 U.S. at 469).

[89] *Commonwealth v. A Juvenile (No. 2)*, 580 N.E.2d 1014, 1017 (Mass. 1991) (quoting *State v. Corbett*, 516 P.2d 487, 490 (Or. Ct. App. 1973)). *See also, e.g., State v. Merrill*, 563 N.W.2d 340, 344 (Neb. 1997) (upholding warrantless entry onto driveway, stating that "the record does not reflect that Merrill's driveway was not visible from the public roadway or that Merrill had a gate, fence, or any other sort of obstruction that limited access to the driveway. Any member of the public could have entered upon Merrill's property in the same manner the officers did."); *Keehn v. State*, 279 S.W.3d 330, 335-36 (Tex. Crim. App. 2009) (upholding warrantless search of van parked in defendant's driveway).

[90] *Robinson v. Commonwealth*, 639 S.E.2d 217, 222 (Va. 2007).

made from such vantage points are not covered by the Fourth Amendment."[91]

Collins errs in claiming that Justice Stewart's plurality opinion in *Coolidge v. New Hampshire*[92] prevents the automobile exception from applying to residential driveways. Pet. 12. It is true that in part II-B of the opinion, the plurality declined to apply the automobile exception to justify the warrantless seizure of a Pontiac parked in the defendant's driveway, when the defendant had already been arrested inside the house on suspicion of murder. But the plurality did not single out the driveway; it relied on myriad factors:

> In this case, the police had known for some time of the probable role of the Pontiac car in the crime. Coolidge was aware that he was a suspect in the Mason murder, but he had been extremely cooperative throughout the investigation, and there was no indication that he meant to flee. He had already had ample opportunity to destroy any evidence he thought incriminating. There is no suggestion that, on the night in question, the car was being used for any illegal purpose, and it was regularly parked in the driveway of his house. The opportunity for search was thus hardly 'fleeting.' The objects that the police are assumed to have had probable cause to search for in the

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[91] LaFave, *supra* note 84, § 2.3(f) (emphasis added).

[92] 403 U.S. 443 (1971).

> car were neither stolen nor contraband nor dangerous.[93]

Even taking the plurality opinion at face value, it is easily distinguished on its facts from this case.[94] Unlike the police in *Coolidge*, who had ample time to obtain a warrant to search the Pontiac, Rhodes learned of the motorcycle's location from Collins's Facebook page at the same time that Collins was briefly being detained at the DMV, and Rhodes had good reason to think that Collins would immediately hide the motorcycle as soon as he could get to it. The mobility concern undergirding the automobile exception is particularly acute when, as here, the vehicle's "owner is alerted to police intentions and, as a consequence, the motivation to remove evidence from official grasp is heightened."[95]

Coolidge is further distinguishable because it involved "a thorough and extensive search of the entire automobile including the *interior* from which, by vacuum sweepings, incriminating evidence was obtained," which is intrusive compared to searches of a vehicle's *exterior*, "for which there [is] no reasonable expectation of privacy."[96] Indeed, there is no reason to think that

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[93] *Id.* at 460.

[94] Various courts have found the *Coolidge* plurality opinion distinguishable based on its "highly fact-specific" approach. *E.g.*, *United States v. Goncalves*, 642 F.3d 245, 250 (1st Cir. 2011).

[95] *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (plurality).

[96] *Id.* at 593 n.9 (emphasis added).

the search of the license number and VIN on the Pontiac in Coolidge's driveway would have troubled the *Coolidge* plurality.

In any event, Justice Stewart's plurality opinion in *Coolidge* does not control the outcome here. Four other Justices dissented in *Coolidge* and would have applied the automobile exception.[97] And while Justice Harlan's concurrence provided the fifth vote, he specifically declined to join part II-B of the plurality opinion and said nothing about the significance of the driveway.[98] This Court has aptly recognized that the plurality opinion in *Coolidge* is "not a binding precedent."[99] And to date, "no circuit appears to read *Coolidge* as a per se rule against all driveway searches without a warrant."[100] Indeed, doing so would require overruling *Scher*.

The "alternatives" that Collins would force on police under the facts of this case are the same ones that this Court found unreasonable in *Chambers*.[101] Having probable cause to walk up the driveway and look under the tarp, perhaps Rhodes could have staked out the

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[97] 403 U.S. at 504 (Black, J., dissenting in part, joined by Burger, C.J., and Blackmun, J.); *id.* at 521-22 (White, J., dissenting in part, joined by Burger, C.J.).

[98] *Id.* at 491 (Harlan, J., concurring).

[99] *Texas v. Brown*, 460 U.S. 730, 737 (1983).

[100] *Goncalves*, 642 F.3d at 251. *See also United States v. Brookins*, 345 F.3d 231, 237 n.8 (4th Cir. 2003) ("Although heightened privacy interests may be triggered when a vehicle is encountered on private property, the *Coolidge* plurality opinion cannot be fairly read to create a bright-line rule precluding warrantless searches on private property under all circumstances.").

[101] 399 U.S. at 51-52.

property until a warrant could be obtained, blocking or stopping Collins from moving the motorcycle until the warrant arrived, or perhaps tailing Collins if he showed up and made off with it. But *Chambers* rejected the chase-the-suspect alternative: "Following the [vehicle] until a warrant can be obtained seems an impractical alternative since, among other things, the [vehicle] may be taken out of the jurisdiction."[102] Indeed, experience taught Rhodes that Collins's racing bike was capable of escape speeds exceeding 140 mph.

Chambers also rejected the stake-out-and-immobilize alternative, explaining that the practical burden on the vehicle owner was the same either way:

> Where this is true, as in *Carroll* and the case before us now, if an effective search is to be made at any time, either the search must be made immediately without a warrant or the [vehicle] itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for the search.[103]

Chambers confirmed that, "[f]or constitutional purposes, we see no difference between on the one hand seizing and holding a [vehicle] before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant."[104] In those circumstances, "there is little to choose in terms of practical consequences between an

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[102] *Id.* at 51 n.9.

[103] *Id.* at 51.

[104] *Id.* at 52.

immediate search without a warrant and the [vehicle]'s immobilization until a warrant is obtained."[105] Accordingly, the automobile exception applies here for the same reasons it applied in *Chambers*.

C. Because petitioner had no reasonable expectation of privacy in the stolen motorcycle or its VIN and tag number, Rhodes properly looked under the tarp.

As shown above, Rhodes had probable cause to believe that the motorcycle was stolen, the motorcycle was plainly visible from the street, and Rhodes had an implied invitation to enter the driveway, given that the motorcycle was parked adjacent to the steps leading up to the front door. The fact that Collins unsuccessfully tried to hide the motorcycle under a tarp makes no constitutional difference.

Rhodes properly looked under the tarp for two independent reasons. First, Collins had no reasonable expectation of privacy in the motorcycle because it was stolen. "Obviously . . . a 'legitimate' expectation of privacy by definition means more than a subjective expectation of not being discovered. A burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as 'legitimate.'"[106] Concealing the motorcycle under a tarp

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[105] *Id.*

[106] *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978).

likewise could give Collins no privacy interest in the stolen motorcycle.[107]

Second, *Class* makes clear that there is "no reasonable expectation of privacy in the VIN," so an officer may reach into the vehicle to move things that obstruct the VIN from plain view.[108] There is no constitutionally significant difference between moving papers off the dashboard to read the VIN in *Class*, and lifting the tarp in this case to read the VIN and tag number on the motorcycle's exterior. Put another way, because Rhodes could have constitutionally walked up the driveway to read the VIN if the motorcycle had been uncovered, *Class* entitled him to lift the tarp that obstructed the VIN from view.

None of this means, as Collins frets, that officers with probable cause but no warrant "could creep into garages and carports at night, removing tarps [and] rummaging for contraband in glove boxes." Pet. 8. Viewing the VIN and tag number on the exterior of the vehicle in the daytime, from a vantage point in the driveway where the officer has an implied license to be present, is easily distinguished from entering enclosed

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[107] *See* LaFave, *supra* note 84, § 11.3(f) ("[A] thief has no legitimate expectation of privacy in stolen property, as such, and this means that the thief cannot establish standing solely by virtue of his relationship to the stolen property, but would have to establish that the police actually interfered with his person or with a place as to which he had a reasonable expectation of privacy.") (citation and quotation omitted).

[108] 475 U.S. at 114.

garages in the dead of night to look around. Not surprisingly, courts have had no difficulty addressing such dead-of-night scenarios, noting that officers in those cases "violated the defendant's reasonable expectation of privacy when they entered the driveway late at night, [at] a time when no reasonably respectful citizen would be expected."[109] By contrast, the standard (indeed, commendable) police investigation conducted here during normal daylight hours presents no threat to Fourth Amendment values.

II. There is no significant split of authorities on the question presented.

Collins has not accurately depicted the legal landscape of courts that have addressed the application of the automobile exception to residential driveways. We agree that five federal circuits—the Fourth, Sixth, Seventh, Eighth, and Ninth—have held that the automobile exception applies to vehicles parked in residential driveways.[110] Although Collins claims that the Fifth and Tenth Circuits have gone the other way, a closer inspection reveals that claim to be exaggerated. Only the Fifth Circuit has directly addressed the question,

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[109] 60 A.L.R. 5th 1, § 7 (collecting cases).

[110] *See Brookins*, 345 F.3d at 237-38 (4th Cir.); *United States v. Markham*, 844 F.2d 366, 368 (6th Cir. 1988); *United States v. Hines*, 449 F.3d 808, 814 (7th Cir. 2006); *United States v. Blaylock*, 535 F.3d 922, 926-27 (8th Cir. 2008); *United States v. Reinholz*, 245 F.3d 765, 776 (8th Cir. 2001); *United States v. Hatley*, 15 F.3d 856, 859 (9th Cir. 1994).

and if there is a split at all, it is a shallow one, the resolution of which would have no bearing on the outcome of this case.

In *United States v. Reed*, the Fifth Circuit upheld the warrantless search of the trunk of a car, parked in the defendants' driveway, based on the district court's finding of exigent circumstances.[111] The drivers were suspects in a bank robbery and the police traced the car to the driveway based on a tracking device the teller hid in the cash she handed over. The opinion nowhere says that the automobile exception does *not* apply to residential driveways. Collins just intuits that, Pet. 19, because the *Reed* court engaged in an extensive analysis of the facts showing that exigent circumstances were present. But Collins's inference hardly qualifies as a holding. And it is important to recall that when *Reed* was decided in 1994, various courts were mistakenly holding that a separate finding of exigency was required for the automobile exception to apply, an error that this Court corrected in *Labron* (1996) and again in *Dyson* (1999), holding that the automobile exception has no such exigency requirement.[112]

Collins next cites the Fifth Circuit's 2006 decision in *United States v. Fields*, but the court there upheld the warrantless search of a vehicle that the driver crashed into his own duplex while trying to elude police.[113] It is true that *Fields* has dictum supportive of

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[111] 26 F.3d 523, 530 (5th Cir. 1994).

[112] *See Labron*, 518 U.S. at 940; *Dyson*, 527 U.S. at 466-67.

[113] 456 F.3d 519, 524-25 (5th Cir. 2006).

Collins's argument. The court read two earlier opinions—neither involving residential driveways—for the proposition that the "automobile exception *may* not apply when a vehicle is parked at the residence of the criminal defendant."[114] But the court noted that *that* issue was not presented because the defendant did not use his duplex for residential purposes and because his vehicle was not in the driveway, but crashed into the duplex itself.[115] In light of those distinctions, *Fields* cannot fairly be counted as holding that the automobile exception is inapplicable to residential driveways.

The best citation supporting Collins's putative circuit split is the Fifth Circuit's decision last year in *United States v. Beene*,[116] but *Beene* is internally inconsistent, and it is not apparent that applying *Beene*'s holding would have any effect on the outcome of this case. Police received a call that Beene, a known drug dealer, had brandished a gun and then driven away in a Honda Accord. An officer intercepted Beene's car just as Beene drove into his residential driveway, where he parked five feet from the street and exited the vehicle. Beene threatened the officer and was detained on the ground. In the meantime, another officer arrived with a drug-sniffing dog, which alerted on the Honda. The

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[114] *Id.* (emphasis added). The court cited dicta in *United States v. Sinisterra*, which involved a mall parking lot, 77 F.3d 101, 104-05 (5th Cir. 1996), and *United States v. Williams*, which involved an apartment-complex parking lot, 124 F. App'x 885, 887 (5th Cir. 2005).

[115] 456 F.3d at 525.

[116] 818 F.3d 157 (5th Cir.), *cert. denied*, 137 S. Ct. 113 (2016).

officer opened the car door, finding illegal drugs and a loaded handgun.[117] The Fifth Circuit held that the use of the dog to detect drugs inside the car did not violate the Fourth Amendment because the portion of the driveway where Beene parked "was not part of the curtilage of Beene's home."[118] The court, however, then observed that exigent circumstances would be required to search inside the car because the car was in the driveway; the court remanded for the district court to determine if exigent circumstances were present.[119]

Those two rulings are difficult to square. If the car was outside the curtilage, justifying the use of a drug-sniffing dog to detect drugs inside the car, then it is hard to understand why the automobile exception would not also apply to allow a search inside the car. What is more, in light of the court's ruling about the use of the drug-sniffing dog, it is likely that the court would have approved the search of the *exterior* of the vehicle, or at least inspection of the VIN—the conduct at issue in this case, independently authorized by *Class*—notwithstanding that the car was in the driveway. We also note that the facts of *Beene* fall squarely within the holding of *Scher*, which upheld the automobile exception as applied to a vehicle that police followed as it pulled into a garage, despite that it was inside the curtilage.

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[117] *Id.* at 159-60.

[118] *Id.* at 162.

[119] *Id.* at 164-65.

So while it is true that *Beene* diverges somewhat from the rule in other circuits, it does not evidence a split on the question presented in this case. As it stands now, *Beene* is an outlier with regard to applying the automobile exception to justify searching the *interior* of a car parked in a residential driveway. And it says nothing about inspecting the *exterior* of a vehicle or examining the vehicle's VIN and tag number, the only conduct that is relevant in this case.

The other cases cited by Collins likewise fail to show that the relevant authorities are divided. The Tenth Circuit in *United States v. DeJear* upheld a warrantless search of a vehicle parked in the driveway of a residence that did not belong to the defendant.[120] The court quoted the Fifth Circuit's dictum in *Fields* that "'the automobile exception . . . *may* not apply when [the vehicle] is parked at the residence of the criminal defendant challenging the constitutionality of the search.'"[121] But the Court found that possibility irrelevant because DeJear's car was not parked outside "*his*" residence.[122] Although the court came close to the issue presented here, it plainly did not reach it. Accordingly, *DeJear* does not count as holding that the automobile exception cannot apply to a defendant's vehicle parked in his own driveway.

Nor do the Georgia and Illinois cases cited by Collins show a relevant split. Pet. 7-8, 20-21. *Vickers*

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[120] 552 F.3d 1196, 1202 (10th Cir. 2009).

[121] *Id.* (quoting *Fields*, 456 F.3d at 524-25) (emphasis added).

[122] *Id.*

and *Redwood* are *intermediate* appellate decisions and therefore do not count under Rule 10 as decisions of "a state court of last resort."[123] Both cases also involved a finding that the vehicle search occurred within the curtilage of the defendant's residence,[124] something that no court below has found in this case (a point on which we expand below). And although *Lejeune* involved a decision by Georgia's highest court, that case is easily distinguishable because the officers there lacked probable cause to search the vehicle, the crucial prerequisite to applying the automobile exception.[125]

In short, because there is neither a pronounced nor mature circuit split on the issue presented here, "this is exactly the sort of issue that could benefit from further attention" in lower courts.[126] This Court "should not rush to answer a novel question . . . in the absence of a pronounced conflict,"[127] a conflict that does not yet exist. As Justice Ginsburg has noted, this Court "in many instances [has] recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more

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[123] *See State v. Vickers*, 793 S.E.2d 167, 171 (Ga. Ct. App. 2016); *Redwood v. Lierman*, 772 N.E.2d 803, 813 (Ill. App. Ct. 2002).

[124] *Vickers*, 793 S.E.2d at 272; *Redwood*, 772 N.E.2d at 812-13.

[125] *State v. Lejeune*, 576 S.E.2d 888, 893 (Ga. 2003).

[126] *Spears v. United States*, 555 U.S. 261, 270 (2009) (Roberts, C.J., dissenting from summary reversal).

[127] *Id.*

enduring final pronouncement by this Court."[128] This is a clear case where prudence dictates waiting until a genuine conflict arises.

III. This case is a poor vehicle to reach the question presented.

This case also comes with two vehicle problems that make it an unattractive candidate for certiorari.

A. No court below made any finding that the motorcycle was parked within the curtilage.

As just pointed out, *Vickers* and *Redwood* were predicated on the vehicle's being in the curtilage of the defendant's home.[129] Although those intermediate State-court decisions are not relevant in demonstrating a relevant split of authorities, their assumption that the vehicle was in the curtilage underscores that some courts have found curtilage determinations to be important when assessing the automobile exception.[130] The Fifth Circuit's decision in *Beene*, Collins's lead case, is one example of a court finding that the portion of the driveway where the vehicle was parked "was *not* part of the curtilage."[131] And this Court has made clear

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[128] *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting).

[129] *See supra* at 32.

[130] *See* 60 A.L.R. 5th 1, § 4(a) (collecting cases).

[131] 818 F.3d at 162 (emphasis added). *See also United States v. Moody*, 668 F. App'x 629, 629 (5th Cir. 2016) ("Our review of the

that the "Government's . . . intrusion" onto real property that is outside the curtilage of a home "is of no Fourth Amendment significance."[132]

Petitioner is wrong that the Commonwealth conceded below that the motorcycle was within the curtilage. Pet. 11. There was no such concession, and petitioner identifies none in the record. What is more, there is good reason to conclude that Collins's motorcycle was outside the curtilage. *United States v. Dunn* teaches that "curtilage questions should be resolved with particular reference to four factors: [1] the proximity of the area claimed to be curtilage to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the area from observation by people passing by."[133] The first factor admittedly tilts towards a curtilage finding, as the motorcycle's location in the driveway was adjacent to the steps leading up to the house, and therefore close to the house itself. But the three other factors weigh against a curtilage finding: the driveway was not within an enclosure that also surrounded the home; the driveway was used only to park vehicles; and no fence or gate was used to shield activities in the driveway from travelers passing

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record and pertinent jurisprudence supports the district court's conclusion that Moody's driveway was not part of the curtilage of his home.").

[132] *United States v. Jones*, 565 U.S. 400, 411 (2012).

[133] 480 U.S. 294, 301 (1987).

by.[134] Under those circumstances, the portion of the driveway where the motorcycle was parked was not curtilage because it did not "harbor[] the 'intimate activity associated with the sanctity of a man's home and the privacies of life.'"[135] Indeed, Collins himself had posted pictures of the driveway and the motorcycle on his Facebook page, discrediting any notion that he tried to keep his activities there entirely private.

Petitioner assumes at times that the trial judge found that the motorcycle was within the curtilage, Pet. 6, but there was no such finding, Pet. App. 105-07 (bench ruling). The Virginia Court of Appeals expressly declined to reach that question, "assum[ing] without decid[ing]" that Rhodes had "entered the curtilage."[136] And although the curtilage issue did not factor into the Virginia Supreme Court's decision, the dissenting justice expressly declined to address whether the part of the driveway where the motorcycle was parked was in the curtilage.[137]

As shown above, this Court's decision in *Scher* demonstrates that the automobile exception can apply to vehicles within the curtilage. But assuming for argument's sake that the Court were interested in using

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[134] *See* Pet. App. 112-13 (photographs).

[135] *Dunn*, 480 U.S. at 300 (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)).

[136] Pet. App. 41.

[137] Pet. App. 30 n.4 (Mims, J., dissenting).

the vehicle's presence in the curtilage to refine or narrow the automobile exception, the Court would have to resolve disputed factual questions to adjudicate the controversy. This "'is a court of final review and not first view.'"[138] Prudence dictates preferring a case in which curtilage findings have already been made by the lower courts.

B. Even if he could escape the automobile exception, Collins would not prevail on his suppression motion.

This case is also a poor vehicle because, even setting aside the automobile exception, Collins would not prevail on his suppression motion. The search of the VIN and tag number on the exterior of Collins's motorcycle was authorized by *Class*. And the search was supported independently by exigent circumstances. As the Virginia Court of Appeals correctly found, "numerous exigencies justified both [Rhodes's] entry onto the property and his moving the tarp to view the motorcycle and record its identification number."[139]

In particular, Rhodes could reasonably believe that Collins was already en route from the DMV to hide the motorcycle, since Rhodes had just questioned Collins about the photos on his Facebook page that showed the motorcycle parked in the driveway of the

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[138] *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1338 (2015) (Thomas, J., concurring) (quoting *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012)).

[139] Pet. App. 41.

Delmeade property. The fact that the motorcycle had twice eluded police, at speeds upwards of 140 mph, showed that it was capable of eluding them again. It was also parked in the driveway, with ready access to public roads. And Collins might arrive at any minute to hide it. Indeed, that appears to be exactly what Collins planned when he arrived at the Delmeade property and changed into his motorcycle outfit, the motorcycle key in his pocket.

* * *

Accepting Collins's legal theory would require this Court to at least partially overrule *New York v. Class* and *Scher v. United States*, two cases that neither Collins nor his amicus even mentions. Moreover, there is at best only a shallow split of authorities on whether the automobile exception authorizes the search of the *interior* of readily mobile vehicles parked in residential driveways; there is no split at all on looking at the VIN and tag numbers on the *exterior* of such vehicles. And given the absence of any curtilage findings by the courts below, and the fact that the search in any event was plainly justified by exigent circumstances, this case would be a poor choice for examining the scope of the automobile exception in the context of residential driveways.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 16-1027

IN THE
Supreme Court of the United States

RYAN AUSTIN COLLINS,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

REPLY BRIEF

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ARGUMENT

The Commonwealth struggles to deny the circuit split in this case. It ignores the First Circuit's recent observation that the scope of the automobile exception on private residential property "is a significant unresolved issue." *United States v. Goncalves*, 642 F.3d 245, 250 (1st Cir. 2011).

On the merits, the Commonwealth unpersuasively theorizes that a thirty-year old case about a lawful traffic stop and an eighty-year old case about a hot pursuit and search incident to arrest resolve the issue against Mr. Collins. That argument fails—and flies in the face of the modern courts' varying positions on this issue.

Nor are there vehicle issues. Mr. Collins presented and preserved his Fourth Amendment arguments below. The factual predicate for the question presented is undisputed. And the Commonwealth's argument that perhaps it could have prevailed in this case on exigency grounds instead takes nothing away from the danger in the Supreme Court of Virginia's opinion, which relies *solely* on the automobile exception to justify the searches here.

This Court should grant the petition.

I. This case asks the Court an unresolved Fourth Amendment question.

This appeal presents a discrete question of law: "whether the Fourth Amendment's automobile exception permits a police officer, uninvited and without a warrant, to enter private property,

approach a home, and search a vehicle parked a few feet from the house." Pet. i. The facts underlying this question are all undisputed. Nothing in the Commonwealth's brief changes that this question is squarely before this court, and that question remains unanswered.

A. Probable cause and mobility are undisputed.

The Commonwealth spills much ink on undisputed issues and gently messaging its view that Mr. Collins is probably guilty of receiving stolen property. BIO 11-16.

The presence of probable cause and the fact that the motorcycle was capable of travel are undisputed premises of the question presented here. The issue is not whether probable cause existed—for purposes of this appeal, Collins admits it did. Similarly, the motorcycle—like most vehicles located on driveways, in garages, and behind houses—was mobile and could readily reach a road.

Further, the Commonwealth's prosecutorial narrative is irrelevant to the Fourth Amendment question. *Illinois v. Caballes*, 543 U.S. 405, 422 (2005) ("Fourth Amendment protection, reserved for the innocent only, would have little force in regulating police behavior toward either the innocent or the guilty.").

B. *New York v. Class* does not apply.

The Commonwealth stakes far too much on *New York v. Class*, 475 U.S. 106 (1986). BIO 36-37.

Class held that police officers who had made a lawful traffic stop on a public road could lawfully look at the car's VIN number, even if the officer had to enter the vehicle and move aside "obscuring papers." *Class*, 475 U.S. at 114. The Court acknowledged that the officer reaching into the vehicle was a "search" for Fourth Amendment purposes, but found it reasonable. *Id.* at 115. The Court rested in part upon a lesser expectation of privacy for VIN numbers, which normally are printed so as to be visible from outside the vehicle, and which are part of government regulation of all vehicles. *Id.* at 112-115.

Class does not permit roving officers to examine VIN numbers in people's driveways, in garages, or under tarps. In short, the officers in *Class* had every right to stand immediately outside the vehicle they had just pulled over. Every car and truck built since 1969 is designed to allow an officer standing outside to see the VIN number. *Id.* Given that scenario, the Court refused to allow a fistful of obscuring papers to create a privacy right for Fourth Amendment purposes. *Id.* at 114.

By contrast, here an officer walked up a driveway, into the curtilage of the home, and pulled a tarp off of a motorcycle. This was done as part of a criminal investigation (not an immediate traffic stop along a public street).

Class would arguably apply here if the officers had stopped Collins on his motorcycle or found it

parked along a public street with the VIN obscured. But *Class* does not permit the intrusion into the curtilage, just as it would not permit an officer to enter a home to search for a vehicle's paperwork, or break into a garage to inspect a VIN number. The Court repeatedly cited the "undoubtedly justified traffic stop" as a premise of its holding. *Id.* at 119.

C. *Scher v. United States* does not answer the issue here.

The Commonwealth also argues that *Scher v. United* States, 305 U.S. 251 (1938), settles the issue of whether the automobile exception applies within the curtilage. BIO 16-17. The Commonwealth theorizes that despite modern disagreement across various circuits and state courts, the problem is actually solved by a widely ignored, eighty-year old case from this Court. That is incorrect.

Scher involved police officers in 1935 who chased a bootlegger into his garage. 305 U.S. at 253. They had probable cause to stop his car before he entered the garage. *Id.* Thereafter, the bootlegger exited his vehicle and made incriminating statements. *Id.* The Court held that the search of the vehicle "accompanied an arrest, without objection and upon admission of probable guilt." *Id.* at 255.

Lower courts have taken various views of *Scher* in the past eighty years. One popular understanding is that *Scher* simply recognizes an exigency apart from the automobile exception, namely, the hot pursuit doctrine. *E.g.*, *United States v. Newbourn*, 600 F.2d 452, 457 (4th Cir. 1979); *People v. Siegel*, 291 N.W.2d

134, 139 (Mich. Ct. App. 1980). No lower court here has suggested that the hot pursuit doctrine applies.

Another understanding is that *Scher* forms part of the search incident to arrest doctrine as applied to vehicles. *E.g.*, *Coolidge v. New Hampshire*, 403 U.S. 443, 524 (1971) (White., J., concurring and dissenting). No lower court in this case suggested that the motorcycle here was searched incident to arrest.

These views further assume that *Scher* remains good law. Some courts hold that *Scher* was a product of its time—"typical of the prohibition era"—and "searches of stationary vehicles" under that opinion are "arguably no longer permissible after" this Court's opinion in *Coolidge*. *Daygee v. State*, 514 P.2d 1159, 1163 & n. 9 (Ala. 1973).

Even the Commonwealth does not say exactly what *Scher* means for modern Fourth Amendment jurisprudence. The Commonwealth suggests that any warrantless vehicle search in curtilage is constitutional under *Scher*. BIO 16-17. But it also assures this Court that there are some undefined limits of vehicle searches in curtilage. BIO 26-27.

Scher does not authorize carte blanche the warrantless search of a vehicle on a defendant's private residential property. The various fractured interpretations of *Scher* only further support granting certiorari in this case.

II. The Commonwealth cannot deny that a split of authority exists.

The Commonwealth gingerly picks through the precedents at issue here. It concludes that the split is

not a "significant split," and argues that "if there is a split at all, it is a shallow one." BIO 27-28. After an extended discussion of the Fifth Circuit's *Beene* decision, the Commonwealth admits that it "diverges somewhat from the rule in other circuits," and attempts to set aside the Georgia and Illinois cases on the grounds that they are intermediate appellate decisions. BIO 31-32. The Commonwealth ignores the recent view of the First Circuit that the question presented "is a significant unresolved issue." *United States v. Goncalves*, 642 F.3d 245, 250 (1st Cir. 2011).

A. The Fifth Circuit clearly disagrees with the Supreme Court of Virginia.

For at least forty years, the Fifth Circuit has held that the automobile exception does not apply to vehicles parked on the defendant's driveway. *United States v. Pruett*, 551 F.3d 1365, 1369-70 (5th Cir. 1977). Instead, separate exigency is required. *United States v. Reed*, 26 F.3d 523, 529-30 (5th Cir. 1994).

The Commonwealth contends Collins "just intuits" *Reed* holds "that the automobile exception does *not* apply to residential driveways." BIO 28. Not true. The Fifth Circuit itself cites *Reed* as holding that "exigent circumstances are also required to justify a warrantless search of a vehicle when the vehicle is parked in the driveway of a residence." *United States v. Orona*, 166 F. App'x 765, 766 (5th Cir. 2006). Indeed, the *Reed* court held that exigency validated the warrantless search in that case in response to the defendant's argument that the automobile exception did not apply. 26 F.3d at 528-30.

The Fifth Circuit reaffirmed this position last year. The court first acknowledged the general, broad

application of the automobile exception. *United States v. Beene*, 818 F.3d 157, 164 (5th Cir. 2016). The court then restated its longstanding holding that the automobile exception does not apply "when a vehicle is parked in the defendant's residential driveway," and instead exigent circumstances must justify a warrantless search. *Id.*

The best the Commonwealth can do is to criticize *Beene* as "internally inconsistent." BIO 29-30. This ignores that *Beene* is the governing law in the Fifth Circuit. Nor does it diminish the Fifth Circuit's clear statement of law about when the automobile exception does not apply—contrary to the Supreme Court of Virginia's holding. Pet. 5-6.

It has been eight years since the Tenth Circuit "acknowledge[d]" the Fifth Circuit's limitation on the automobile exception. *United States v. DeJear*, 552 F.3d 1196, 1202 (10th Cir. 2009). In *DeJear*, the court applied the Fifth Circuit's reasoning to hold that the automobile exception did apply because the vehicle was not parked at the defendant's residence. *Id.* Rather than adopt the same categorical rule as the Supreme Court of Virginia, the Tenth Circuit aligned itself with the Fifth Circuit. Pet. 20.

B. State courts cannot be cast aside.

The Commonwealth hardly addresses the state court holdings that conflict with the decision of the Supreme Court of Virginia in this case. BIO 31-32.

Fourteen years ago, the Supreme Court of Georgia held that the automobile exception does not apply to a defendant's vehicle parked on his private, residential parking spot. *State v. LeJeune*, 576 S.E.2d

888, 892-93 (Ga. 2003) ("We conclude that the automobile exception does not apply where, as here, the suspect's car was legally parked in his residential parking space, the suspect and his only alleged cohort were not in the vehicle or near it and did not have access to it, and the police seized the automobile without a warrant.").

This holding has been affirmed and clarified to clearly address a vehicle parked on curtilage. *State v. Vickers*, 793 S.E.2d 167 (Ga. Ct. App. 2016). The state court of appeals referred to the "*established Georgia rule* that vehicles, like any other item or location within the curtilage of a residence, are not to be searched without a warrant, consent, or exigent circumstances." *Id.* at 171 (emphasis added).

This authority conflicts with this case—the "established Georgia rule" conflicts with the new rule established by this case in Virginia. The Commonwealth attempts to distinguish *LeJeune* because in addition to holding that the automobile exception did not apply, the court held probable cause did not exist. BIO 32; *LeJeune*, 576 S.E.2d at 892-93. This does not erase the court's initial holding that the automobile exception does not apply to vehicles parked on the defendant's private, residential property. Alternative holdings are not dicta.

Meanwhile, in Illinois, the automobile exception has not applied to vehicles on curtilage for fifteen years. *Redwood v. Lierman*, 772 N.E.2d 803, 813 (Ill. App. Ct. 2002). The Commonwealth argues that how the Fourth Amendment is applied in Illinois does not matter only because it was decided by an intermediate state appellate court. BIO 32. The Commonwealth does not argue that Illinois applies

the automobile exception consistent with the Supreme Court of Virginia.

These cases are from the modern era, but they have been around long enough to warrant this Court's attention. Intermediate appellate courts, particularly when they announce the "established . . . rule" in their states, should not be ignored by this Court.

III. This case is a good vehicle.

A. Curtilage has long been assumed in this case.

Below, the parties litigated this case on the (entirely reasonable) assumption that a motorcycle parked up a dead-end driveway, next to a wall a few feet from the side of the house, was located in the curtilage. *See* App. 8-9 (quoting Collins arguing that the motorcycle was sitting in the curtilage, and the Commonwealth not denying this, but responding that the automobile exception applied).

The Commonwealth also consistently admitted below that the officer's actions were Fourth Amendment "searches" that needed to be justified by some exception to the warrant requirement. *See, e.g.*, App. 37-38. This further supported an assumption that the motorcycle fell within the curtilage.

The Virginia courts followed suit. The Supreme Court of Virginia never held that the motorcycle was outside the curtilage. Indeed, its holding that the automobile exception applied despite the undisputed location of the motorcycle on private, residential property just a few feet from the house appeared premised on the idea that if it *was* within the

curtilage, that did not matter. *See also* App. 30 n.4 (Mims, J., dissenting) (describing the motorcycle as parked "beyond the front perimeter of the house, past the front porch and front door, and . . . merely feet—no more than the width of the sport-utility vehicle parked in front of it—from the side perimeter wall of the house."). For its part, not having heard the Commonwealth deny it, the Court of Appeals simply assumed that the motorcycle was parked in the curtilage. App. 41. Pictures of the scene were in the record for all to see. App. 113-14.

Now, for the first time, the Commonwealth engages in an extended discussion of the curtilage standard and denies that the searches here entered curtilage. But not having asked the state courts to make a ruling on the curtilage issue, the Commonwealth cannot now point to their assumption of curtilage as a vehicle problem. This is improperly "blow[ing] hot and cold" to discourage this Court's review. *See Callanan Road Improvement Co. v. United States*, 345 U.S. 507, 513 (1953).

Moreover, it is undisputed—and the pictures show—that the motorcycle sat beyond the front wall of the house, in an enclosed dead-end driveway just a few feet from the side of the house. App. 113-14.

These basic facts are ample to permit this Court to comfortably address the question presented here: whether and to what extent the automobile exception extends into private, residential property. After all, many courts that have correctly limited the automobile exception only require the vehicle to be on the defendant's private, residential property—not necessarily inside curtilage. *See, e.g., United States v.*

Beene, 818 F.3d 157, 164 (5th Cir. 2016); *United States v. DeJear*, 552 F.3d 1196, 1202 (10th Cir. 2009); *State v. LeJeune*, 576 S.E.2d 888, 892-93 (Ga. 2003).

B. Alternative bases for affirmance ignored by the Virginia Supreme Court do not cut against review.

This case warrants review because of what the Supreme Court of Virginia *did* say about the Fourth Amendment and the automobile exception, not because of what it *might have said* if it had properly addressed those concepts.

At most, the arguments about exigency could warrant a remand for "further proceedings not inconsistent with this opinion" after this Court determines the scope of the automobile exception. This is a common occurrence and not a meaningful vehicle problem. *See, e.g.*, *Skinner v. Switzer*, 562 U.S. 521, 537 (2011) (remanding for lower court to decide appellee's alternative arguments that were not addressed below).

CONCLUSION

The petition should be granted.

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IN THE

Supreme Court of the United States

RYAN AUSTIN COLLINS, *Petitioner*,

v.

COMMONWEALTH OF VIRGINIA, *Respondent*.

On Petition for a Writ of Certiorari
to the Supreme Court of Virginia

Brief *Amicus Curiae* of United States Justice Foundation, Gun Owners Foundation, Gun Owners of America, Inc., Downsize DC Foundation, DownsizeDC.org, Conservative Legal Defense and Education Fund, and Policy Analysis Center in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

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SUMMARY OF ARGUMENT

The Supreme Court of Virginia erred when it ruled that the constitutionality of the search of a motorcycle within the curtilage of a house should be decided based on this Court's automobile exception to the Fourth Amendment warrant requirement. That ruling was grounded exclusively on this Court's 1984 decision in Maryland v. Dyson, because the motorcycle (i) was

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

mobile and (ii) allegedly constituted contraband. However, as clearly demonstrated by Petitioner in his petition for rehearing to the Supreme Court of Virginia, the officers conducting the warrantless search of the curtilage of the house where Collins was living had no reason to believe the motorcycle had been stolen at the time of the search, rendering the Dyson rule inapplicable.

Petitioner repeatedly argued below the applicability of this Court's recent decisions in United States v. Jones and Florida v. Jardines, which re-established the primacy of the Fourth Amendment's protection of property, and instructs courts to resort to expectations of privacy only when the property principles do not resolve the case in favor of the person seized or searched. Nevertheless, the Supreme Court of Virginia did not even address the applicability of those cases. Had those precedents been applied, it would have been clear that the officers who invaded the curtilage of a home without invitation or warrant were no better than trespassers.

Even if the automobile exception could be said to apply to this case, it would not justify a warrantless trespass to conduct the search within the curtilage of a home. The mere fact that a vehicle is moveable cannot justify such a search of private property without a warrant. The Virginia Supreme Court's assumption that this Court's automobile exception was unlimited was error.

Lastly, should this Court grant certiorari to consider the applicability of the automobile exception

on private property, it should use this case to reconsider the automobile exception, which has been expanded incrementally in a long series of cases to the point where it bears no relation to the purposes for which it was originally crafted in Carroll v. United States over 90 years ago.

ARGUMENT

I. THE SUPREME COURT OF VIRGINIA MISSTATED THE FACTS UPON WHICH IT FOUND PROBABLE CAUSE.

All three Virginia courts determined that the police had probable cause to enter the property where Collins resided as well as to search the motorcycle. The Supreme Court of Virginia, however, made a very different probable cause finding — one that contradicts the record, raising serious questions about the integrity of the Court's decision that the search fits within the automobile exception to the warrant requirement.

After its pretrial hearing on Collins' motion to dismiss, the trial court found the police had probable cause to believe the motorcycle parked at the residence was the same motorcycle that had **eluded** the police. *See* App. 106-07. Likewise, the Court of Appeals agreed that there was probable cause "to believe that the motorcycle was the one from the **eluding** incident." 773 S.E.2d at 45. The Supreme Court of Virginia, however, claimed that "[t]he facts of this case" show "Officer Rhodes had several reasons to believe the motorcycle was **contraband**" — *i.e.*, that

it was **stolen property**. 790 S.E.2d at 617. However, there is simply nothing in the record to support the Virginia Supreme Court's assertion that the police had probable cause to believe Collins' motorcycle was stolen at the time they performed their search. *See Amicus* App at 2-4.

The Supreme Court of Virginia stated that probable cause was based on the fact that "Eric Jones had informed Officer Rhodes that he sold Collins the motorcycle **with the warning that it was stolen. Therefore**, when he arrived at the ... residence ... Officer Rhodes **already suspected that the motorcycle** which had eluded him and Officer McCall **was stolen property**." 790 S.E.2d at 617. This finding was not based on anything known to the officers at the time of the search, but erroneously based on Jones' testimony "at trial" that he "sold Collins the motorcycle in April 2013 with the caveat that the motorcycle lacked title and was stolen." *Id.* at 613.

In his petition for rehearing below, Collins alerted the Supreme Court of Virginia to this discrepancy, documenting it as both "unsupported by the record and inconsistent with Officer Rhodes' testimony." *See Amicus* App. at 2. Additionally, Collins' petition reminded the Court that "[p]robable cause can 'only be measured by objective facts known to the police officer prior to the search" citing California v. Minjares, 443 U.S. 916, 921 (1979). *Id.* at 4.

According to both the record and factual recitations by all three courts, at the time that he performed his

search, the only thing Officer Rhodes knew was that Jones had sold Collins a motorcycle. It was only "**[l]ater, at trial**" that Jones testified that both he and Collins knew the motorcycle was stolen. If Jones had told Officer Rhodes that the motorcycle was stolen when they spoke on July 25, 2013 (App. at 80), as the Supreme Court of Virginia claimed, it would make little sense that Officer Rhodes had done nothing with the information until the search of Collins' motorcycle three months later on September 25, 2013.[2]

As Collins pointed out in his rehearing petition, the Virginia Supreme Court's probable cause finding "cannot be relied upon as justification for the warrantless search," because of its erroneous factual assumption that prior to the search of the curtilage of Collins property they had reason to believe that the motorcycle was "contraband." *Amicus* App. at 4. This error was both material and prejudicial.

The Supreme Court of Virginia explained that, although the Court of Appeals had "analyzed the issue based on probable cause and exigent circumstances, this case is more appropriately resolved under the automobile exception" (App. 12), resting its opinion upon a 1982 decision of this Court:

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[2] *See* App. at 101 (trial counsel argued that learning "subsequent to [the search] that vehicle was, in fact, reported stolen had nothing to do with eluding which was the reason for the ... search in the first place."); *see also* App. at 85 (Officer Rhodes admitting that he did not believe the motorcycle to be contraband — *i.e.*, stolen — when he searched it).

> The Supreme Court has articulated a simple bright-line test for the automobile exception: "[i]f a car [i] is readily mobile and [ii] probable cause exists to believe it **contains contraband**, the Fourth Amendment permits police to search the vehicle without more. [Citing Maryland v. Dyson, 527 U.S. 465, 467 (1982).] Applying that test to this case, we hold that Officer Rhodes' warrantless search of the motorcycle was justified under the automobile exception.... [App. 14-15 (emphasis added).]

In order to establish the linkage between the facts of this case and the Dyson rule, the Supreme Court of Virginia wrongly claimed that "Officer Rhodes Had Probable Cause to Believe the Motorcycle **Was Contraband.**"[3] App. 15. This false claim that the motorcycle "**was contraband,**" permitted the court to decide the case under the Dyson rule which applied only "if" a vehicle "**contains contraband**" (and, thus, arguably if a vehicle **is** contraband). The Virginia Supreme Court's application of the automobile exception is unsupported and cannot stand.

The Court's failure to grant Collins' rehearing petition to remedy this obvious error undermines the integrity of the Virginia Supreme Court's interpretation and application of this Court's

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[3] The court assumed without any discussion that there was no distinction between a vehicle which "**contains contraband**" and one which "**was contraband.**"

automobile exception to this case, necessitating review by this Court. *See* 790 S.E.2d at 613.

II. THE SUPREME COURT OF VIRGINIA MISTAKENLY IGNORED JONES AND JARDINES TO THE PREJUDICE OF THE PETITIONER.

A. The Supreme Court of Virginia Completely Ignored the Property Baseline Established in Jones and Jardines.

The Supreme Court of Virginia granted review to decide two assignments of error to the lower courts: whether "the officer **illegally trespassed onto private property** for [the] purpose of conducting a search in violation of [the] Fourth Amendment," and whether "the officer acted lawfully under the Fourth Amendment in **entering the property** and searching the motorcycle." 790 S.E.2d at 616 (emphasis added). However, the court disregarded those questions, resolving Collins' property claims as if they were based upon expectations of privacy under the automobile exception.

At the pretrial hearing on Collins' motion to suppress, defense counsel correctly noted that "the two cases that are on point are ... United States v. Jones and Florida v. Jardines." App. at 97. Counsel correctly explained that Jones "revolv[es] around trespass on ... property [and] has nothing to do with ... reasonable expectation [of] privacy." *Id.* Counsel noted that Jardines mandates that "expectation of privacy ... is not an issue" and that "officers may not

enter [the home or curtilage] for the purposes of doing a search without a warrant." *Id.* at 98.

In denying Collins' motion to suppress, the trial court revealed that it did not understand that Jardines had been based on property rights, claiming that "while I don't find the facts [from Jardines] to be similar [to the facts here], I find the issue to be similar and that is what is a reasonable expectation of privacy." App. at 105.

The Virginia Court of Appeals also addressed Jones and Jardines, deciding that "neither [case] addresses any exceptions to [Fourth Amendment] protections." 773 S.E.2d at 621. In a lengthy footnote, the court dismissed the applicability of Jones because the automobile exception issue had not been argued in the case. *Id.* at 621, n.1. In a separate footnote, the court of appeals also minimized and dismissed Jardines, claiming that it "merely [offers] support for the familiar concept that the Fourth Amendment protects the curtilage of the home...." *Id.* at 621, n.2. In other words, the Court of Appeals treated Jones and Jardines as if the principles therein have absolutely no application or relevance to the automobile exception, even when that exception is used to justify a search of a vehicle within the curtilage of a home.

Whereas the lower Virginia courts gave Jones and Jardines short shrift, the Supreme Court of Virginia ignored them completely,[4] even though Jones and

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[4] Only incidentally did the Supreme Court of Virginia quote from Jardines to define what constitutes the curtilage of the home.

Jardines constituted the central legal argument made by defense counsel in the trial court.

But how can a court decide a Fourth Amendment case about automobiles, and completely ignore Jones? And how can it decide such a case about the curtilage of a home, without even discussing Jardines? Both Jones and Jardines apply factually and legally to this case — and yet the Supreme Court of Virginia ignored them both.

B. Jones and Jardines Restored the Fourth Amendment's Property Baseline.

Beginning in the 1960's, this Court began to decide Fourth Amendment cases based on the atextual view that the Fourth Amendment protects only a right to privacy (a right first articulated in an 1890 law review article co-authored by then-attorney Louis Brandeis).[5] Although initially foretold in Warden v. Hayden, 387 U.S. 294 (1967), and applied soon thereafter in Katz v. United States, 389 U.S. 347 (1967) as a way to increase the Fourth Amendment protection of unfamiliar modern technologies, the right to privacy soon began to have precisely the opposite effect. Over the next 45 years, many protections of the Fourth Amendment have been slowly eroded based on judges' perceptions of what governmental intrusions were necessary, as

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App. 30.

[5] *See* S. Warren & L. Brandeis, "The Right to Privacy" 4 HARVARD L. REV. 193 (Dec. 15, 1890).

balanced against what expectations of privacy were reasonable.[6]

In 2012, the privacy stranglehold on the Fourth Amendment ended. In United States v. Jones, government agents placed a GPS tracking device on a suspect's Jeep, and then used the transmitter to track his location over an extended period of time. Unsurprisingly, based on nearly five decades of privacy precedents, the government argued that "no search occurred here, since Jones had no 'reasonable expectation of privacy' in the area of the Jeep accessed by Government agents (its underbody) and in the locations of the Jeep on the public roads." *Id.* at 950. But the Court refused to grant the government *carte blanche* authority to track Americans as if they were dogs embedded with microchips.

In an effort to perform triage on a hemorrhaging Fourth Amendment, the Court in Jones returned to first principles, and rediscovered (or at least reaffirmed) that the Fourth Amendment first and foremost protects fixed individual property rights free from government intrusion and, only secondarily, protects evolving privacy considerations. *Id.* at 949-51. From that perspective, the Court found that attaching the device was a "physical intrusion" under the Fourth Amendment, which violated Jones's right to exclusive possession. *Id.*

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[6] *See* Katz at 360 (Harlan, J., concurring, coining the phrase "reasonable expectation of privacy").

The following year, the Court continued its revitalization of the Fourth Amendment's property roots in Florida v. Jardines, 133 S.Ct. 1409 (2013). There, in a similar fact pattern to this case, this Court determined that the police may not, without a warrant, trespass on a person's private property, enter the curtilage of his home, and use a drug-sniffing dog to search the outside of the home for drugs. *Id.* at 1414-15. After finding that the area searched by the police and dog was "constitutionally protected," the Court considered "whether [the search] was **accomplished through an unlicensed physical intrusion**." *Id.* at 1415 (emphasis added). The Court found that "introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence" was not part of the customary societal license accorded to persons coming to the front door of a home. *Id.* at 1415-17.

As it had in Jones, the government in Jardines argued that an "investigation by a forensic narcotics dog by definition cannot implicate any legitimate privacy interest." *Id.* at 1417. The Court rejected that rationale and, relying upon Jones, determined that "we need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy under *Katz*," since the property law baseline had been breached by the physical intrusion upon Jardines' house in violation of the Fourth Amendment. Jardines at 1417.

Thus, in both Jones and Jardines, this Court addressed first whether the government intrusions — involving an automobile in Jones and the curtilage of

a home in Jardines — compromised any Fourth Amendment property right in "persons, houses, papers, [or] effects." *See* Jones at 949 and Jardines at 1416. Yet the Virginia courts failed to address Collins' claimed rights in the curtilage of his home and in the belongings in his driveway.

C. The Police Violated Collins' Fourth Amendment Property Rights.

The Supreme Court of Virginia majority opinion describes this case as one which involves "the search of the motorcycle," even though the police first removed a tarp to uncover the motorcycle. 790 S.E.2d at 621. That is akin to saying a police officer who opens a briefcase to search the papers inside it has not searched the briefcase. Writing in dissent, Justice Mims claimed that "Officer Rhodes did not search an automobile, he searched a tarp." *Id.* at 26. In reality, Officer Rhodes searched both the motorcycle and the tarp — but just as importantly, he also searched the curtilage of the home — the private property where he was trespassing.[7] The courts below failed to recognize this reality, even though the Supreme Court of Virginia admitted that "Collins has consistently characterized Officer Rhodes' conduct as an 'illegal trespass'...." *Id.* at 620.

As in Jardines, the property "principle renders this case a straightforward one." Jardines at 1414. The

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[7] Had the police had obtained a warrant, it no doubt would have been a warrant to search Collins' **property** for the motorcycle that had eluded them.

officers "were gathering information in an area belonging to [Collins] and immediately surrounding his house ... which [this Court has] held enjoys protection as part of the home itself.[8] And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner." *Id.* As this Court noted, "A police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen might do.'" *Id.* at 1416.

No one disputes that a Fourth Amendment "search" occurred in this case. As in Jones, "[t]he Government physically occupied private property for the purpose of obtaining information." Jones at 949. And, as in Jardines, the police trespassed on private property to snoop around the property, which **was** "'**more** than any private citizen might do.'" Furthermore, Jardines concluded that "[t]here is no customary invitation to do *that*." Jardines at 1416 (emphasis added). The only question, then, is whether the "automobile exception" to the warrant requirement can be applied — without violating the principles from Jones and Jardines — to override a person's property interest in his "houses and effects." The answer to that question is most certainly no.

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[8] Unless the police could demonstrate they had a superior property interest justifying their presence on the property where Collins lived, they were no more than common-law trespassers, poking around someone's garage.

III. THE COURTS BELOW HAVE MISUSED THE AUTOMOBILE EXCEPTION TO SWALLOW UP THE FOURTH AMENDMENT.

A. The Original Purposes of the Automobile Exception Do Not Apply to this Case.

Nearly a half century ago, the Court described the automobile exception, like all exceptions to the Fourth Amendment, as having been "'jealously and carefully drawn.'" Coolidge v. New Hampshire, 403 U.S. 443, 455 (1971). The Court asserted that "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Id.* at 461. Unfortunately, the opposite has been the case.

As Justices Souter and Breyer put it, the Court has "permit[ted] bare convenience to overcome our established preference for the warrant process...." Florida v. White, 526 U.S. 559, 573 (1999). These justices cautioned that "the exceptions have all but swallowed the general rule." *Id.* at 569. Nearly two decades later, the probable cause and warrant requirements have become little more than platitudes for trial courts — to be recited before being disregarded. As one commentator put it, "[w]hile the Court continues to pay lip service to this catechism, its actions have transformed [the Fourth Amendment's requirements] into an historic relic...." L. Katz, "The Automobile Exception Transformed: The Rise of a Public Place Exemption to the Warrant Requirement," 36 CASE W. RES. 375, 376 (1986).

What began as a modest waiver of Fourth Amendment principles in Carroll has now become a broad abdication of the Court's responsibility to defend Americans from arbitrary intrusions by government.

With this case, the Supreme Court of Virginia has taken the automobile exception where it has not gone before, holding that the Fourth Amendment's requirements do not apply to persons, houses, and effects **wherever a vehicle is located**. In this case, in order to search the actual motorcycle they were after, the police first trespassed into the curtilage of Collins' home, then they lifted his tarp off the motorcycle, and then they examined the motorcycle, discovering that it was stolen. They then knocked on the front door and arrested Collins without a warrant. *See* 790 S.E.2d at 614.

A long line of cases has relegated the automobile to the status of second-class type of property,[9] unworthy of protection under the Fourth Amendment. However, if the opinion of the Supreme Court of Virginia is permitted to stand, the mere involvement of an automobile in a criminal investigation will result in the destruction of all Fourth Amendment protections — not just for automobiles, but for whatever else may be in the vicinity.

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[9] Congress may have distinguished between homes and automobiles in 1925 in the National Prohibition Act. *See also* California v. Carney, 471 U.S. 386 (1985). Importantly, the Fourth Amendment, however, makes no such distinctions. It protects "persons, houses, papers, and effects" — it does not single out any of those categories for greater or lesser protection.

Under such a regime, what would stop the police from entering not only curtilage, but also a garage, to search a vehicle? Or, many homes are built with customized living spaces to house rare or expensive collectible automobiles, and at the other end of the spectrum, many homes contain living spaces within a garage. In such situations, what would stop the police from waltzing right into a home based on the automobile exception? Indeed, the Supreme Court of Virginia appears to have specifically rejected the idea that there are any limits on where the police can trespass — so long as their search involves an automobile. The court made clear that its holding was not based on reduced expectations of privacy, noting that "[t]he Court focused on the mobile characteristics rather than the exact location...." *Id.* at 619. Based on that understanding, the police literally can go anywhere that an automobile can be found. They could enter a carport, they can enter a garage, they can enter a basement, completely undermining the sanctity of the home.

The Supreme Court of Virginia justified its opinion in this case in part on the theory that "**[t]he Supreme Court has never limited the automobile exception** such that it would not apply to vehicles parked on private property." *Id.* at 619. Of course, this is a logical fallacy. Lack of disapproval does not indicate approval. Unfortunately, because this Court has routinely expanded the automobile exception, lower courts now apparently believe that the exception is limitless. As one commentor has put it, "it appears that Courts are interpreting [this Court's precedents] as carte blanche to approve the inclusion of evidence

found without a warrant, so long as an automobile was somehow involved in the crime or violation in question." K.H. Chilcoat, "The Automobile Exception Swallows the Rule: Florida v. White," 90 J. CRIM. L. & CRIMINOLOGY, 917, 945 (1999-2000).

B. The "Automobile Exception" Undermines Jones and Jardines.

Under a "reasonable expectation of privacy" analysis, persons, houses, papers, and effects are protected only when judges feel the government has gone too far. Under a property rights analysis, however, property rights are triggered the moment the police step foot onto the property without a legal right to do so. To analyze this case only from a privacy standpoint undermines the property rights baseline the Court guaranteed in Jones and Jardines. It undermines the idea that privacy rights can only add to — **but not subtract from** — the property rights baseline.

This Court's opinion in Jones told us that even a "technical trespass" is still a Fourth Amendment violation. In Jardines, the Court determined that such a search without a warrant was unreasonable. The Court looked at the license of the country to determine what sort of license an ordinary citizen had to approach a private home. The Court then held the police (with no warrant) to the same standard, deciding they could do "no more than any private citizen may do."

After Jones and Jardines, the automobile exception can no longer be understood as being confined to a person's "reasonable expectation of privacy" in his vehicle. Yet that is the modern foundation of the automobile exception. At a minimum, this Court should grant the petition to reevaluate the automobile exception in light of the property rights principles from Jones and Jardines. And, because the automobile exception undermines those principles, the Court should take this opportunity to reconsider the automobile exception, ceasing to treat the automobile as an inferior type of property under the Fourth Amendment.[10]

IV. THIS COURT SHOULD GRANT THE PETITION TO RECONSIDER THE AUTOMOBILE EXCEPTION.

We are taught that the Fourth Amendment usually requires the police to have a warrant based upon probable cause before they conduct a search. *See*

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[10] If the automobile exception cannot be justified based on privacy, then all that is left is exigency. But that provides no protection at all. If all that is required to avoid the Fourth Amendment is allegations of exigency, the police might argue that they should be permitted to search a home without a warrant. Indeed, there are far more ways for a person to hide or destroy evidence in a home than in a car. One could flush drugs down a toilet, burn bloody clothes, grind the serial number off a gun, or take a shower to wash off the evidence. While the Court of Appeals below decided this case based on a general theory of exigency, the Supreme Court of Virginia recognized that was an insufficient basis, holding that "this case is more appropriately resolved under the automobile exception." *Id.* at 616.

Coolidge v. N.H., 403 U.S. 443, 444-45 (1971). Consequently, searches without probable cause and a warrant traditionally have been considered *per se* unreasonable, and thus unconstitutional. *See* U.S. v. Ross, 456 U.S. 798, 825 (1982). Indeed, courts seem to be quite fond of continually reminding us of this maxim — right before sanctioning a search or a seizure that occurred without a warrant, and often even without probable cause. Each time, the waiver is granted based upon one of several euphemistically termed "narrowly drawn exceptions" to the warrant requirement.[11]

The problem is that one of the "exceptions" to the warrant requirement seem to apply more and more frequently, and it is a rarity for a court to require the police to obtain a warrant before they act. Exceptions to the warrant requirement now apply to police stops on the street (stop & frisk), or in a car or mobile home (automobile exception), or during an arrest (search incident to arrest) — situations where over 90 percent of involuntary police encounters with the public appear

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[11] There reportedly are at least six exceptions to the warrant requirement. **Three** are well rooted in the common law (a limited search incident to arrest, the plain view doctrine, and emergencies/hot pursuit). **One** arguably does not even involve a Fourth Amendment search (consent or waiver, whereupon police become akin to an invitee or licensee). However, **two** of the exceptions to the warrant requirement — the "stop and frisk," Terry v Ohio, 392 U.S. 1 (1968), and the "automobile exception," Carroll v. United States, 267 U.S. 132 (1925) — were created by this Court, based on little more than the **public policy preference** of the justices then on the Court to prevent the Fourth Amendment from "unreasonably" impeding police work.

to occur.[12] And in most such cases, the police are not required to have a warrant, and often not even probable cause.

A. Exigency Because of Inherent Mobility.

The "automobile exception" was birthed in 1925 in Carroll v. United States, 267 U.S. 132 (1925). The case involved the search of a vehicle pursuant to the National Prohibition Act, which provided for the warrantless search, seizure, and forfeiture of vehicles used to transport illegal liquor.[13]

As justification for the warrantless searches of automobiles, the Court cited a Congressional report which claimed that "It would take from the officers the

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[12] According to the Bureau of Justice Statistics, about 63 million Americans age 16 or older had at least one interaction with the police in 2011. Obviously, some persons had more than one encounter, and no doubt many had several or more. Approximately 49.2 percent of those interactions were classified as "involuntary contact" with the police, involving either traffic stops, street stops, arrests, or other involuntary contacts (presumably some of which occurred inside the home). L. Langton, Ph.D., and M. Durose,"Police Behavior During Traffic and Street Stops, 2011," BJS, September 2013, https://www.bjs.gov/content/pub/pdf/pbtss11.pdf.

[13] At the same time, Congress prohibited the warrantless search of a "private dwelling" — even going so far as to make it a crime punishable by imprisonment for any government agent who engaged in a warrantless search of such a dwelling. *Id.* at 143-44. Ironically, here the Virginia courts use the automobile exception to justify a search of the curtilage, which this Court has held is part of the dwelling, the same as inside the home. *See* Jardines at 1414.

power that they **absolutely must have to be of any service**, for if they can not search for liquor without a warrant they might as well be discharged." *Id.* at 146 (emphasis added). Thus, the Court found that Congress intended "to make a distinction between the **necessity**[14] for a search warrant in the searching of private dwellings and in that of automobiles...." *Id.* at 147. Similarly, the Court claimed that there was "**necessary** difference between a search of a store, dwelling house or other structure ... and a search of a ship, motor boat, wagon or automobile ... where it is not practicable to secure a warrant because **the vehicle can be quickly moved**...." *Id.* at 153 (emphasis added).[15]

In later cases, the Court would boil down this "necessity" rationale as stemming from a vehicle's inherent mobility, claiming that an automobile "creates circumstances of such exigency that, as a **practical necessity**, rigorous enforcement of the warrant requirement is impossible." South Dakota v. Opperman, 428 U.S. 364, 367 (1976) (emphasis added).

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[14] "'[U]seful,' and 'necessity' was always the 'tyrant's plea.'" C.S. Lewis, God in the Dock (1970) at 333.

[15] Of course, times have changed greatly since Carroll was decided. In Carroll, the police still were required to have probable cause to stop a vehicle, where now they need only reasonable suspicion. And these days, the police are protected by an incredibly robust form of "qualified immunity," shielding them from consequences arising from most abuses of their authority.

B. Mobility Without Exigency.

Then, in Chambers v. Maroney, 399 U.S. 42 (1970), the Court reviewed its prior holdings where "exigent circumstances" were required to search an automobile. *Id.* at 51. In Chambers, there were **no exigent circumstances,** because the automobile was being held in police custody. *Id.* at 44. Nevertheless, the Court declared that because the vehicle was still mobile, it could be searched without a warrant. *Id.* at 52. In other words, theoretical mobility — even without exigency — is enough.

C. No Mobility — So Exigency And Pervasive Regulation.

Then, in Cady v. Dombrowski, 413 U.S. 433 (1973), the Court was confronted with the search of a heavily damaged automobile that had been towed to a service station. The vehicle was **not inherently mobile** and, indeed, was inherently immobile. *Id.* at 435-37. However, the Court nevertheless assumed that there was still an exigency, since the police suspected the vehicle to contain a firearm, and alleged a search was necessary to "'protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands.'" *Id.* at 443, 447.

Having now applied the automobile exception to cases where there was no exigency, and to cases where there was no mobility, an entirely new rationale was created — that automobiles and their drivers are **heavily and pervasively regulated.** *Id.* at 441. Writing for the majority, Justice Rehnquist admitted

"that this branch of the law is something less than a seamless web," *id.* at 440, admitting that the Court had now expanded the automobile exception to cases where none of the original justifications existed. *Id.* at 442-43.

D. Reduced Expectations of Privacy.

The Court further tweaked its pervasive regulation rationale, adding that, because a vehicle is in the public view, "the **expectation of privacy** with respect to one's automobile is significantly less than that relating to one's home or office." Opperman at 367 (emphasis added).[16] Essentially without explanation, the Court simply asserted that anytime the police are engaged in "'community caretaking functions,'" the Fourth Amendment's probable cause and warrant requirements do not apply, and any search the police conduct is "reasonable." *Id.* at 370.

The Court's rationale shifts from mobility, to pervasive regulation, to expectations of privacy freed it to justify use of the automobile exception "in cases in which the possibilities of the vehicle's being removed or evidence in it destroyed were remote, if not nonexistent." Cady at 441-442.

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[16] In Opperman, the Court saw no need to require probable cause, since the defendant in that case had violated a parking ordinance, even though it technically was not a crime. There, the Court permitted a suspicion-less and warrantless "routine inventory search of an automobile lawfully impounded by police for violations of municipal parking ordinances." *Id.* at 365.

E. In the Face of Heightened Privacy Interests, Back to Mobility.

In California v. Carney, 471 U.S. 386 (1985), the police entered and searched a parked mobile home without a warrant — a location where privacy interests were heightened. The Court was confronted with a "'hybrid' which combines 'the mobility attribute of an automobile ... with most of the privacy characteristics of a house.'" *Id.* at 395.

The Court claimed that "the mobility of a vehicle 'is no longer the prime justification for the automobile exception; rather 'the answer lies in the diminished expectation of privacy which surrounds the automobile.'" *Id.* at 390. However, shortly after making this pronouncement, the Court ignored the obviously heightened privacy aspects of the mobile home, and swung back to its mobility justification, claiming that since the vehicle could still be mobile, that was enough to justify the search.[17] *Id.* at 393. In reaching this conclusion, the Court opened the door to the home, the one place previously thought to be off limits to warrantless searches (*see* Carroll at 147 n.5, *supra*).

F. Summary.

The automobile exception has been nothing if not flexible. The Court has used mobility as a justification

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[17] *See also* Pennsylvania v. Labron, 518 U.S. 938 (1996) (finding that inherent mobility alone is sufficient reason for a warrantless search of an automobile).

when there is no exigency, and used exigency when there is no mobility. When neither of those justifications exists, the Court has adopted new reasons, such as pervasive regulation and reduced expectations of privacy. Later, the Court relied on reduced expectations of privacy in cases where there is no mobility, and used mobility in cases where there was no reduced expectation of privacy. Thus, mobility/exigency and pervasive regulation/reduced privacy expectations appear to have become independent justifications for the automobile exception. With so many different independent justifications, the automobile exception can be (and has been) employed to sanction searches in a wide variety of circumstances.

Now, in this case, the government asked the courts below to go even further -- and to apply the automobile exception to justify a search of the curtilage of the home where the motorcycle was stored, the tarp that covered it, and even the warrantless arrest of the person inside the home. The absurdity of that request should alarm this Court. It is well past time for this Court to reexamine the automobile exception itself, and this case provides an excellent vehicle to do so.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Amicus Appendix

In the
Supreme Court of Virginia
at Richmond

Record No. 151277

RYAN AUSTIN COLLINS, *Appellant*,
v.
COMMONWEALTH OF VIRGINIA, *Appellee*.

PETITION FOR REHEARING

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Petition for Rehearing
Ryan Austin Collins v. Commonwealth of Virginia

I. The majority opinion erroneously concluded that Officer Rhodes had probable cause to believe that the motorcycle was contraband.

The Supreme Court correctly articulated the test for applying the automobile exception; namely, "[i]f a car is readily mobile and probable cause exists to believe it contains contraband,[1] the Fourth Amendment ... permits police to search the vehicle without more." Slip. Op. at 11.

The majority stated that probable cause was based on the fact that "Eric Jones had informed Officer Rhodes that he sold Collins the motorcycle with the warning that it was stolen." *Id.* This finding of fact, framed as occurring prior to Office Rhodes' search, is unsupported by the record and inconsistent with Officer Rhodes' testimony.

Officer Rhodes was evasive about when he actually spoke to Eric Jones but specifically denied that Jones was the source of his information linking Collins to the motorcycle at the time of the search of the vehicle. At the suppression hearing, the following exchange took place:

(Counsel): So how far in advance of September 10 did you talk to Eric Jones?

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[1] "Goods that are unlawful to import, export, produce or possess." Black's Law Dictionary at 365 (9th ed. 2009)

(Rhodes): I don't recall. It was sometime after the July 25th date. I just don't recall exactly. I don't remember.

(Counsel): Okay. So it must have been Eric Jones who told you that he sold the bike to Mr. Collins?

(Rhodes): I was able to develop that information. Mr. Jones was very difficult to contact and get a hold of basically. **But I was able to get that information that Mr. Collins was supposedly riding that motorcycle based on an informant, yes.**

(Counsel): Based on an informant. **Was that informant Eric Jones?**

(Rhodes): **No it was not.**

(JA 93-94) **(emphasis added).**

And later:

(Counsel): And the motorcycle itself is not, per se, illegal, it's not contraband or anything like that?

(Rhodes): No.

(J.A.98).

Officer Rhodes specifically stated that his intended purpose of the search related to "the felony of eluding" - not related to a crime involving stolen property. J.A.98. Over the course of two hearings and a trial, Officer Rhodes never testified that he had any reason to believe the vehicle was stolen prior to conducting his search.

Probable cause can "only be measured by objective facts known to the police officer prior to the search." *California v. Minjares*, 443 U.S. 916, 921 (1979). Any facts Officer Rhodes gathered after the search of the tarp/motorcycle could not give rise to probable cause. At the time of the search, Officer Rhodes had no reason to believe that the motorcycle was allegedly stolen and probable cause cannot be built on an unknown allegation. *Id.*

Thus, the Supreme Court erroneously concluded that Officer Rhodes had probable cause to believe that the motorcycle was contraband. Slip Op. at 11.

Without facts establishing probable cause to believe the motorcycle was contraband, the automobile exception cannot be relied upon as justification for the warrantless search.

II. The majority opinion erroneously applied the automobile exception to justify a warrantless search of the home's curtilage.

A. The Fourth Amendment requires a sequential analysis.

A case may encompass a series of government actions. The Fourth Amendment requires sequentially evaluating those facts to determine when a search occurred. *See, e.g., Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987); *United States v. Moses*, 540 F.3d 263, 272 (4th Cir. 2008). "[T]he basic structure of existing Fourth Amendment law rests on [this] sequential approach." Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 316 (2012). "[T]o analyze whether

government action constitutes a Fourth Amendment search or seizure, courts take a snapshot of the act and assess it in isolation." *Id.* at 315. For each fact, this Court must separately determine whether it was a search under the Fourth Amendment and, if so, if it was reasonable. *United States v. Jefferson*, 571 F. Supp. 2d 696,701 (E.D. Va. 2008); Kerr, 111 MICH. L. REV. at 316-20.

This sequential analysis applies with full force to this case. The opinion recognized that this case implicated two Fourth Amendment searches: (1) search of the curtilage[2] and (2) search of the

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[2] The Commonwealth conceded that a Fourth Amendment search of the curtilage occurred. COA Comm. Br. at 10-12. The Commonwealth waived argument to the contrary. Rule 5A:21 (d); *see Jeter v. Commonwealth*, 44 Va. App. 733, 740-41 (2005). Collins noted that this issue was thus uncontested. Op. Br. at 11. The Commonwealth could "not resurrect the issue" abandoned in the Court of Appeals. *Wright v. Commonwealth*, 261 Va. 1, 1 (2000).

This case is not a "knock and talk" limited to the path up the driveway to the front door. *Florida v. Jardines*, 133 S.Ct. 1409, 1415 n.1 (2013). Officer Rhodes walked "something like" "a car length or two" up the driveway. JA 90; Slip Op. at 5. To reach the motorcycle, Officer Rhodes walked past the home's front perimeter. JA 68-69,72-74, 124-26; Slip Op. at 22 n.4 (Mims, J., dissenting). Officer Rhodes did not approach the front door because his goal was the motorcycle sitting beyond and directionally different from the front porch. JA 124, 126. The motorcycle was a few feet from the home's sidewall, where a side porch would sit. JA 126. The motorcycle was enclosed by a "retaining wall" on one side and the house on the other. JA 69, 126.

Officer Rhodes crossed into this private area immediately adjacent to the home to investigate. This was a search of curtilage. *Jardines*, 133 S.Ct. at 1414-17; *United States v. Perea-Rey*, 680

tarp/motorcycle. *See* Slip Op. at 6-7. So did the Court of Appeals. *Collins v. Commonwealth*, 65 Va. App. 37, 622 (2015) ("The first 'search' challenged is Officer Rhodes's entry onto the property to examine the motorcycle.").

This Court did not evaluate the reasonableness of each Fourth Amendment search separately. Instead, the opinion collapsed these two searches into one and answered whether the search of the tarp/motorcycle was reasonable. Slip Op. at 9-16. This Court thus upended "the foundation of existing search and seizure analysis" by disregarding the requirement to sequentially evaluate these searches. Kerr, 111 MICH. L. REV. at 316.

B. This Court's opinion erroneously applied the automobile exception to justify the warrantless search of curtilage.

The opinion recognized two different searches: a search of curtilage, and a search of the tarp/motorcycle. This Court then undertook a single reasonableness analysis, relying solely upon the automobile exception. Consequently, this Court applied the automobile exception to justify a warrantless search of curtilage. Counsel has found no court endorsing such a holding.[3] The automobile

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F.3d 1179, 1188 (9th Cir. 2012) (Fourth Amendment search, not a "knock and talk," when officer "bypass[ed] the front door and walk[ed] around the side of the house into the carport").

[3] The Court's reliance on *United States v. Brookins*, 345 F.3d 231 (4th Cir. 2003) is misplaced because in that case (1) the court found

exception applies to searches of automobiles—not to searches of homes or curtilage. *Maryland v. Dyson*, 527 U.S. 465, 466-67 (1999) (automobile exception applies to "searches of vehicles"); *McClish v. Nugent*, 483 F.3d 1231, 1240-41 (11th Cir. 2007) (warrantless entry into the home excused only by consent or exigency).

The opinion will be read as applying the automobile exception to warrantless searches of curtilage. This is not an unreasonable interpretation, as the opinion itself recounts the Commonwealth asserting this argument. Slip Op. at 6-7. In fact, the Attorney General pressed this argument in the Court of Appeals. COA Comm. Br. at 11-16. There is no reason why this argument, now approved by this Court, will not be used in the future. This application of the opinion will disrupt the careful balance between security and freedom struck by the Fourth Amendment in three significant ways.

First, the opinion can be cited to ignore all searches in any factual sequence except for the final search. This results from the majority opinion disregarding the heightened protections implicated by the initial search (curtilage), to evaluate only the reasonableness of the subsequent search (tarp/motorcycle). *See United States v. Martinez-Fuerte*, 428 U.S. 543, 562 (1976) ("expectation[s] of privacy in an automobile ... are significantly different from the traditional expectation of privacy ... in one's

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that the police had probable cause to believe the vehicle contained contraband, and (2) the issue of whether the police searched the curtilage was neither raised by the parties nor decided by the court.

residence"). For example, a court can replicate the majority opinion's analytical structure by refusing to consider the reasonableness of entry into a home, to evaluate only a subsequent search of a purse or briefcase found inside the home.

Second, this Court's opinion can be cited to ignore Fourth Amendment protections of the home if probable cause relates to a vehicle. On its face, the opinion permits entry into or through curtilage—be it a garage, a carport, or an enclosed side garden—if probable cause relates to an automobile within, or accessible beyond, that curtilage.

Curtilage has the same Fourth Amendment protections as the home. *Rogers v. Pendleton*, 249 F.3d 279, 287 (4th Cir. 2001). The opinion's treatment of curtilage instructs how to handle the home's Fourth Amendment protections. For example, entry into and through a home can be held reasonable on the basis that it was a direct route to a vehicle in a back yard. Entry through curtilage to reach a vehicle is legally indistinguishable from entry through a home to reach a vehicle.

Third, as the opinion gives blanket authorization to searches attendant to an automobile search, it invites more invasive warrantless searches with modern technology. The majority opinion articulates no limiting principle to its novel application of the law. As just one example, the opinion may authorize the surreptitious mounting of a recording device on private property if there is probable cause to believe that a vehicle related to criminality will be subsequently recorded. Entry onto property and installation of a device could be held reasonable if the ultimate search is a video recording of a vehicle.

III. Conclusion

For the foregoing reasons, the Appellant, Ryan Austin Collins, respectfully prays that this Court grant his petition for a rehearing.

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In the Supreme Court of the United States

RYAN AUSTIN COLLINS,
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v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

Commonwealth of Virginia
In the Circuit Court of the
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No. 13-672

Commonwealth of Virginia v. Collins

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I, Roxanne Bruce, Deputy Clerk of the above mentioned court, certify that the papers listed above and filed herein are the original papers in the above styled case.

Teste: Debra M. Shipp, Clerk
By: /s/Roxanne M. Bruce
Deputy Clerk

VIRGINIA: IN THE GENERAL DISTRICT COURT OF ALBEMARLE COUNTY

No. CR13000672

[Filed November 22, 2013]

COMMONWEALTH OF VIRGINIA,	)
	)
Plaintiff,	)
	)
v.	)
	)
RYAN AUSTIN COLLINS,	)
	)
Defendant.	)
	)

PRELIMINARY HEARING

Taken on

October 17, 2013

LANE'S COURT REPORTERS, INC.
401 8th STREET NE
CHARLOTTESVILLE, VIRGINIA 22902

[p.2]

APPEARANCES:

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BEFORE: The Honorable William G. Barkley

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EXAMINATION OF DAVID RHODES [1-49]

October 17, 2013

THE COURT: Ryan Collins.

MR. CASEY: Preliminary hearing, Your Honor.

(Court addressing another case at this time)

THE COURT: All right, let me swear you in.

(Witnesses sworn)

MR. CASEY: Start with Officer Rhodes, Your Honor.

THE COURT: All right.

OFFICER DAVID RHODES, having been so duly sworn, testified as follows:

DIRECT EXAMINATION

By: Mr. Casey

Q Good morning, sir, would you please introduce yourself for the record.

A Officer David Rhodes with the Albemarle County Police Department traffic unit.

Q And, Officer Rhodes, were you so employed on the 10th day of September of this year?

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A I was.

Q And on that day did you have occasion to come in to contact with the defendant in this case, Mr. Ryan Collins?

A I did.

Q All right, and do you see Mr. Collins in the courtroom today?

A I did, right here.

Q The Court will note for the record---

A To my left.

Q Oh, the Court will note for the record the witness identified the defendant.

THE COURT: Yes, sir.

Q Now, Officer Rhodes, I'm going to take you back, if I could for a second, to July the 25th, and I'm going to ask you on July the 25th were you working?

A I was.

Q Were you wearing uniform, badge of authority?

A Yes.

Q And were you operating a marked patrol vehicle or a Albemarle County unit?

A I was operating my unmarked, my issued unmarked Albemarle County police unit, yes.

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Q All right. And that particular day did you have occasion to come into contact with any kind of motorcycles that day?

A Yes, I was travelling on the 250 Bypass travelling southbound in the area approaching Ivy Road, I observed a motorcycle approaching from the same direction as I was travelling, also travelling southbound in the left lane at a high rate of speed approaching me from behind, approaching my position.

Q All right. And when you say a high rate of speed, do you know what the marked speed limit is around that area?

A It's 55 in that area between the Barr---I started noticing the motorcycle from the Barracks Road exit travelling southbound, approaching where I was, topping at the hill at Ivy, Old Ivy Road area.

Q All right. And so were you yourself going about 55, or more, or less, or do you remember?

A 55.

Q 55?

A 50-55.

Q And so this vehicle is approaching you then, presumably, would be going somewhat more than 55 if it's approaching you, is that right?

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A That's correct.

Q Okay.

A And I could tell based on training experience I was looking at the vehicle in my rearview mirror and in my side mirror and could see the vehicle was approaching at a very high rate of speed. Based on that I activated my radar in a same direction mode, which would obtain the speed of the vehicle coming up behind me. When I activated the radar I got a clear reading. It was the only vehicle between, only vehicle actually in the on---in sight from my vehicle to the rear of me anywhere on the bypass, in the same direction. I activated my radar and got a clear steady reading at 100 miles per hour.

Q So what did you do when you got that reading then?

A I slowed down, the motorcycle came up behind me, I slowed down and started to actually move over, knowing that motorcycles, in my experience, will sometimes attempt to try to get away or duck off when

they realize the police are going to try to stop them. I then made a move that I was going to get off the bypass onto Old Ivy Road or Faulkner Drive area right by the school. Once I committed to that and the motorcycle had committed to stay on the bypass, I then got back on the bypass directly beside the motorcy-

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cle. We were directly beside and we had slowed down to a very slow speed of under 55, probably 45 miles per hour at that point. The motorcyclist and I actually made eye contact through my driver side window. I activated my lights, and when I did the motorcyclist looked at me, laid down on the bike, downshifted, and took off.

Q And when you say the motorcyclist looked at you, was this a---was this person dressed in a way that you could see their face or did they have---

A No.

Q ---some kind of safety equipment on?

A No, they had a full face helmet with a tinted helmet shield on, I couldn't see the face at all. The only thing I could identify was the motorcycle itself.

Q But you were able at that particular---was this at daytime or nighttime?

A It was daytime.

Q So were you able to get a good look at the motorcycle?

A I was.

Q And what did the motorcycle look like?

A It was orange, the swing arm, which is the rear part of the motorcycle, was stretched out very---longer than what factory would be, more of a sport and racing type mo-

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torcycle. It was bright orange or burnt orange color, and also bla---it had black on it, was chrome, it was all chrome, had all the forks in the front, all the swing arm, the wheels were all chrome. I was, literally, it was probably almost within a arm's reach of my car, so I could see it very well from where I was seated.

Q Now, Officer Rhodes, I don't know a whole lot about motorcycles, but you're in the traffic unit and traffic unit runs motorcycles a lot or (unintelligible), this particular motorcycle, in your training experience in the traffic unit, is this a---was this a particularly unusual or particularly common, or how would you describe the relative commonality of this motorcycle?

A Somewhat unusual with the fact of it being all chrome. A lot of money had been put into this motorcycle, accessories, after-market accessories in my opinion was, it was chrome, chrome wheels, it was stretched out, usually that indicates a racing type motorcycle, somebody may be dragging, drag racing this motorcycle or something of that nature.

Q I got you. So this motorcycle takes off, and were you able to catch it?

A No, I was not.

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Q So, the motorcycle takes off, and then, let me take you now to September the 10t. So September the 10th did you have occasion to respond to an area here in Albemarle County and see the defendant?

A I did. I was actually working on something else and patrol units had gotten a call to respond to DMV on Ivy Road here in the county for someone that was attempting to register a vehicle that had come back as stolen out of New Jersey.

Q All right. So did you respond to the DMV here in Albemarle County?

A I did.

Q And is that the DMV up on Pantops?

A Yes, it is.

Q All right. Now when you responded were there other officers already there?

A Yes, there was a couple other officers that were already there.

Q Do you remember who those officers were?

A It was Officer Cavanaugh, Vanderveer, and Officer McCall also came, he and I arrived about the same, Matt McCall arrived about the same time.

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Q All right. And when you arrived there did you find anybody else, any civilians that were notable to you besides these officers?

A Mr. Collins was there, and there was somebody else there, I don't remember, there was somebody else standing around, I think maybe it was a security officer from DMV initially.

Q Okay. But the defendant was there?

A Yes.

Q All right. And was the defendant speaking to you or any other officers when you arrived?

A He was speaking to Officer Vanderveer when I got there, to Vanderveer and to Cavanaugh at the same time.

Q All right. So did you walk up and have a conversation or participate in the conversation with the defendant?

A I did.

Q All right. And tell the court, please, what that conversation---what was that conversation about and what did the defendant say, what happened?

A Officer McCall was also there, he'd had this motorcycle we believe to be the same motorcycle that I attempted to stop on June 4th, he had tried to stop the same motorcycle on Seminole Trail and Hydraulic, and so he was

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there for the same reason I was. We had both developed this, and Mr. Collins is a suspect in that incident, so once we heard his information being run on the radio, that's how we ended up at DMV was we heard Ryan Collins' name run across the radio, so I

went there to try to speak with him in reference to that. Officer McCall, in my presence, read Mr. Collins the Miranda warning and he agreed to speak with us. While speaking with us I asked him about this motorcycle and if he knew what I was talking about. He told me he didn't know anything about a motorcycle and he hadn't ridden a motorcycle in months. We went on to talk a little bit more about it. While Officer McCall was speaking with him I went over and looked at Mr. Collins' Facebook page and observed a couple pictures of---that he had on his Facebook page, he had indicated unbackable (sic), but he had indicated to me that he had sold a black Acura just a few weeks prior to that, and now had a silver Acura that was there right in front of me that I was looking at that he was trying to obtain a title to, or transfer title to him that was in that parking lot. During the course of looking at his Facebook page, there was a picture of that silver car, the black Acura that he had---I assumed that he had indicated that he was trying to---had sold a few weeks before. In the background of that picture was a motorcycle that looked

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identical to the one that I had tried to stop on the bypass. I took photographs of that, which I have on my phone. I took photographs of the screen on the computer. I went back and showed Mr. Collins those pictures and asked him where that motorcycle was, he knew about that motorcycle, he told me he didn't know anything about it.

Q So, did you speak to him about, you said that he told you that he was there because he was trying to register or get a title to a silver Acura?

A That's correct.

Q So tell the judge, if you would please, did you have a conversation with him about his attempt to register the silver Acura?

A I did. We spoke a little bit about it. He had---he had the title with him, and he told me---we started talking about sale price, and I asked him about the---how much he had paid for the Acura, and he told me $6,000. When I started looking at the title, it said $1,500 on the sale price. It was indicated on---on the title itself had $1,500 written in it as the sale price of that Acura. Which, the same one he was trying to register to him. I looked at the VIN number and matched the VIN number on that car to the title that I had in my hand that he had provided to me. And so we talked a little bit about that. Not a whole lot, but

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I was more, at that point, really trying to get to the---find where this motorcycle was at that point. But did get that information about the title that was, basically had been forged.

Q So I'm going to stop right there for a second and ask you, I'm going to show you two documents that I'll ask to be admitted as Commonwealth's exhibits 1 and 2. Do you recognize these two documents?

A I do. This is the title that I obtained, and this Agent Davis provided to me this morning. I hadn't seen this until today, but that's it.

Q Okay. So this here is just the document that he had that particular day that he had in his possession, is that right?

A That's correct.

Q Now, I want to ask you, Officer Rhodes, in red here is written the word copy. Was that written here on the day that Mr. Collins presented you with this document?

A No. This---I made a photocopy, a color copy, of the title, placed the original color copy, or the original title that he had, I placed that into evidence, and I made a color copy of this and wrote copy there just if something happened to it, somebody couldn't use that.

Q But otherwise, in any other way does it look---

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A It's identical.

Q ---a true and accurate copy of---

A Yes.

Q ---the title that you got?

A Yes, it is. Yes, it is.

Q May I cross over, please? You said that he---

MR. WEBER: No objection.

Q Oh, thank you. So, let me ask you, Officer Rhodes, you said that he said he paid $6,000 for the vehicle, is that right?

A That's correct.

Q But here it says sale price of $1,500, is that right?

A That's correct.

Q So did you speak to him about that difference in price?

A I don't recall what we, exactly what the difference in price, what we---I did question that I thought the vehicle was worth more than $1,500, based on looking at the vehicle, but I don't recall exactly what our conversation was related to the difference between the 6,000 and the 1,500.

Q In other words, he didn't give you any explanation---

[p.15]

A No.

Q ---that you remember?

A No, other than he did mention a couple times that he was trying to save money by avoiding the taxes that would be required if he paid six---if he put $6,000 on the title. So he was trying to avoid, basically, avoid the taxes because of having a kid and having a family, trying to avoid, save some money.

Q I got you. So, let me take you back to this motorcycle again. So you were speaking to him about this motorcycle, and you show him the photograph, he says I don't know anything about that motorcycle. So, tell me what happened, tell the judge, please, what happened next?

A Mr. Collins had indicated not far---not long after I showed him that picture that he was done talking with us, and we told him he was fine he could leave, and so he left. Immediately following that I actually received information that the motorcycle was located on Dellmead Avenue in city of Charlottesville. I used to work for the city police department, and looking at that picture that was on his Facebook page I knew that those---most of those houses in that area were brick ranch style homes in that general area off of Angus Road, and somewhat made sense that that could be a possibility, so I went to the Dellmead Avenue---to

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Dellmead Avenue and looked to attempt to find this motorcycle that we were looking for. When I got to Dellmead Avenue, the address, the exact address was 2304 Apartment B, it's a duplex, on Dellmead Avenue, it's right off of Angus Road in the city. When I got there there was a motorcycle, it was parked behind a silver 4Runner, kind of parallel or almost behind it, it was kind of up against a wall, but it was visible from the roadway. It was under a white cover, I could see underneath the bottom part of the cover, the tires were sticking out, sitting on the asphalt, so the tires were sticking out and I could see chrome wheels on both, both chrome wheels, the front and the back I could see were chromed. It was also longer, which was consistent with what I was looking for, what that motorcycle would have been. Underneath that cover there a, you know, the outline of the bike appeared to be longer under that cover than what a conventional stock motorcycle would be.

Q Did the cover cover the entire, even the front wheel as well, or was the front wheel exposed in any way?

A It was exposed, the underside part of the wheel, maybe about half of the front tire and wheel were exposed where you could actually see them, and you could actually see the chrome on the wheels on the front, for sure, and a little bit on the back.

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Q So, Officer Rhodes, having seen that, tell the judge please, if you would, what happened next.

A I went and actually pulled the cover, based on that it appeared to be the motorcycle that I was probably looking for. I pulled the cover back, looked at the tag on the motorcycle, which was different than the tag I initially had on that motorcycle, and I attempted to stop it. That tag that day came back not on file. The tag that was displayed on the motorcycle at the time when I tried to stop it on the bypass on the 25th of July was not on file. Through our PISTOL local search I did come up with some information where it had been stopped on another motorcycle by another officer that was registered to Eric Jones, and that comes into play a little bit later. But, anyway, the motorcycle that was there on Dellmead with the tag, I ran that tag and it came back to a different motorcycle, not---it came back to a Kawasaki, this was on a Suzuki motorcycle.

Q And tell us, please, what kind of motorcycle was this. You said it was a Suzuki, is it a particular model or?

A It's a Suzuki GSXR 750.

Q And do you know what year the motorcycle is?

A I believe 2008, I believe, I'd have to look back, I don't recall exactly. But I think it---

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Q Off the top of your head you don't?

A I think it was 2008.

Q Okay.

A So once I removed the cover, as soon as I removed the cover I realized this is exactly the motorcycle I was looking for. Ran that tag, it came back to the wrong motorcycle. Ran the VIN number off of---that was displayed on the motorcycle. It came back stolen out of New York.

Q Do you know what date it was---had been stolen out of New York? Was it recently or was it sometime before?

A No, it was quite some time. A couple of years.

Q Okay. Go ahead.

A I then---there was nobody at the residence at that time, I then covered the motorcycle back up and left. Hoping to, assuming that Mr. Collins was coming back to Dellmead Avenue so I could speak with him. A short time later, I went on, parked on another street. I observed the vehicle that he had gotten into to leave from the DMV to go back to wherever he was leaving from the DMV. I observed it pass me, and Mr. Collins wasn't in that vehicle. There had been three occupants, his brother, I believe, was driving, a female, and then

Mr. Collins had been seated in the back of the car. I saw him leave DMV in that vehicle.

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Q Now, when you say that vehicle, are we talking about the silver Acura or something else?

A No, something totally different.

Q Something totally different, okay.

A The reason I say that is once I saw that vehicle come down the street, he wasn't in it, I made the assumption he was at Dellmead Avenue, he had been dropped off at Dellmead Avenue. So I went back to the address on Dellmead, knocked on the door, he came to the door, and he had changed clothes, he was wearing something different than what he had been wearing at DMV 30 minutes prior.

Q Now let me ask you a question, this was---this particular day was September the 10th, is that right?

A That's correct.

Q Was it a warm day or a cold day or something different?

A It was pretty warm. It was up in the, I would say over 90 that day.

Q Okay.

A It was pretty warm that day.

Q And when he came to the door was he dressed in--do you remember how he was dressed?

[p.20]

A He was wearing a pair of jeans, tan work boots, work style boots, and a long sleeve shirt, I don't, maybe a sweatshirt type shirt.

Q Thick clothing?

A Thicker, yeah.

Q Okay.

A Heavier than what I would think you'd wear in the summer.

Q Okay. So he's wearing this clothing, and tell the judge, please, when he comes to the door what happened next?

A I asked him, I said do you mind if I speak with you, and he said sure. We came---came outside, and I started inquiring about the motorcycle. I asked him he knew about this motorcycle, he told me he didn't know anything about it, it was a friend's. I then asked him, you told me when the last time was you had ridden a motorcycle, and he had told me prior that, at DMV he had told me it had been several months. He had then told me well I did ride it over, bring it over from my mom's, over in Northfield over to Dellmead Avenue, but that had been a while and I don't ever drive it, because I don't have a motorcycle license.

Q Now you're using that word it, is he talking about---

[p.21]

A The motorcycle, I'm sorry. He's talking about that motorcycle, I had uncovered it and said whose

motorcycle is this? He told me that he didn't know anything about it and that he had only ridden it over there one time because he didn't have a motorcycle license and he doesn't routinely ride it. I'd also established some inform---gotten some informat---or received some information that this same motorcycle may have been at Jarman's Sportcycle very recently to obtain, to have new tires put on it. Officer McCall went to Jarman's and spoke with them, and I've got the receipt from where the motorcycle was there on September 2nd, it was there to have new tires put on it.

Q So did you speak to him about that?

A I did. He then told me, well, yeah, you're right, I did take it to Jarman's and get the tires put on the motorcycle.

Q You had mentioned earlier, Officer Rhodes, that the tag on the motorcycle didn't belong to that motorcycle. So did you ask him about that tag to that motorcycle that was on there?

A I did. He told me that it had come off of another motorcycle that he had purchased and since sold.

Q Did he tell you then, ultimately, whose motorcycle it was?

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A He told me it was---he didn't---it was his. He told me ultimately he had bought it, he had paid $3,500 to Eric Jones for the motorcycle, and that's where the tag comes back into play that I initially had on the motorcycle that day, which corroborated that story that

that tag had had involvement with Eric Jones on it initially, and now he's telling me that---

Q He bought the motorcycle from Eric Jones?

A The motorcycle from Eric Jones, and he had paid $3,500 for it, and there was no title for the motorcycle.

Q Okay. Did you place the defendant under arrest?

A I did.

Q And when you arrested the defendant, did you conduct a search incident to arrest?

A I did.

Q Now when you searched the defendant incident to arrest, did you find anything particular on his person?

A His wallet, and he had a key that worked that--- that operated that motorcycle, in his pocket.

Q Now, I want to ask you one more question, if I could, about that title. After you arrested him did you speak to him again about the title, do you remember having any more, questioning him about the title?

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A Yes.

Q Did he indicate to you who signed the title in this case?

A He told me that he had signed the title.

Q All right. And did he make any more statements to you about his title or the intent that he had when he passed that title to DMV?

A He just told me he was trying to avoid the taxes and save money.

Q All right. With respect to the incident at DMV, did everything there take place in the County of Albemarle?

A Yes.

Q And how about when you spoke to the defendant at the house, everything take place in Albemarle County as well?

A That was actually the city of Charlottesville, just right around the corner from the county, but that was actually in the city.

Q Was it within 300 yards of the county?

A Sure.

Q Okay. Those are the questions that I have for you, Officer Rhodes, but please any questions that Mr. Weber might have for you.

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CROSS-EXAMINATION

By: Mr. Weber

Q Officer Rhodes, you say you responded to DMV because you heard about Mr. Collins attempting to register a vehicle that was stolen, is that correct?

A That's correct.

Q All right. And you said you went there to investigate an incident that occurred on July 25th?

A Well I went there initially---right. I went there on September 10th because his name was run across the radio, and he was my suspect from that incident on July 25th, that's correct.

Q You said you had developed him as a suspect---

A That's correct.

Q ---in this incident with the motorcycle---

A That's correct.

Q ---that passed you on 250. So that whole stuff about the incident on 250, that's what you were investigating, is that correct?

A Yes, sir, that's correct. I went there for that, yes.

Q That night. Now you've had contacts with Mr. Collins in the past, is that right?

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A I have, yes.

Q Many times, isn't that right?

A A couple times, yes.

Q Yeah. And you know where he lives. You know his mom lives on Northfields, right?

A Right, oh, yes.

Q And you know that he was living there too, right?

A I don't know where he was living, but that's the address he gave me the day we were at DMV, yes.

Q But on July 25th up through September 10th, did you ever make any attempt to go to visit him at his house?

A Several attempts, yeah.

Q Did you ever---

A Never, we went by the house and there was never anybody there, nobody would come to the door. I didn't personally do that, I did that one time, and another officer did it on the evening shift one time.

Q So from---you're saying from July 25th to September 10th you went by several times to his house and nobody was there?

A I went by, I drove by there twice. I went one time to the door, and another officer went one time to the door, I think it was once or twice.

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Q Okay, and you're saying nobody was there?

A We never---I don't know if anybody was there or not, but there was no response.

Q No response the time you went to the door, is that right?

A Correct, that's right.

Q Okay. And so what you heard on September 10th, you heard his name on the scanner, and you said ah, he's there, I'm going to go see him, is that right?

A I heard his name on my police radio, yes.

Q Right, okay. So that's why you were there. All right, just wanted to verify that. Now, so he was up there dealing with another motor vehicle that was reported stolen, is that correct?

A Right, out of New Jersey.

Q A silver Acura, is that what it was?

A That's correct.

Q He was attempting to register that?

A Yes, that's correct.

Q Okay. Now, as it turns out subsequent investigation that vehicle was not stolen, is that correct?

A Yeah, something to do with New Jersey, something happened in New Jersey and they'd done something, I don't know what that was, but---

[p.27]

Q Right.

A ---we did get information later that that was not correct.

Q Turned out that it was not stolen?

A That's right.

Q That he had actually legitimately bought the vehicle, and that he was---

A The best we could tell, yes

Q ---attempting to register it. Okay, let me---can I show you one other document here regarding that, show you this bill of sale here?

A Sure.

Q Now in addition to the title, you also received this piece of information, is that correct?

A I got this this morning from Agent Davis, I didn't have access to this until this morning, until just now.

Q Okay, but that's a bill of sale from the seller to the buyer, is that right?

A It appears to be, yes. It says a vehicle price certification, and then underneath it there's parenthesis, says bill of sale.

Q And it's signed by both the seller and the buyer?

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A That's correct.

Q And, of course, the title is signed by both the seller and the buyer, right?

A That's right. Appears to be, I don't know who this person is, but it appears to be, yes.

Q Okay, right. But that says that the price was $1,500, is that right?

A That's correct.

Q So the only information you have that it was different than 1500 is what he told you?

A That's correct.

Q Okay. Now, you then said that while you were having contact with him you went on his Facebook page and developed information about where the motorcycle was and all that. You had not done that at any time prior to September 10th?

A I had done that. However, the pictures that were---the information that I'd received, I didn't personally see the---I didn't personally have access to his Facebook page, but I know somebody that does, and the pictures he initially had on the Facebook page, my understanding was that they had been removed right after July 25th.

Q Okay. But what I'm---

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A But, no, my---I did not make an attempt to do that between those two dates, because they had been removed is what I was told, and I didn't have access to his page.

Q All right. Now, but somebody in your unit did have access to his page?

A That's correct.

Q Okay. But you didn't ask that person to check his Facebook page prior to September 10th?

A I had, and the pictures had been removed.

Q Okay. Now, you had said that this incident of the eluding, you said the tag---when you finally went to Dellmead and you looked at the motorcycle and you saw the tag on it, that it was not the same tag that was on it when the person was driving it, is that correct?

A That's correct.

Q Okay. The tag that was on it when they were driving came back to Eric Jones, is that right?

A Through DMV it came back not on file, which meant that it had been so long, the tag had been inactive for such a long amount of time that it was then no longer in the system at DMV.

Q Okay.

[p.30]

A So that motorcycle tag, 786100, which was the tag that was on the motorcycle the day of July 25th, had been basically deactivated by DMV.

Q Okay. But you said something, and I thought, maybe I misunderstood, you said different tag and you said it was registered to Eric Jones. What was---

A No, it was---no, maybe I misunderstood, or maybe you misunderstood me, the tag was not on file, period, at all at DMV.

Q Okay.

A When I ran it through our PISTOL system, which is our local database, that tag I ran into that system comes back as having involvements with Eric Jones.

Q I see.

A Okay. So that's how I made the connection with Eric Jones, and then that corroborated what he told me, which was he bought the motorcycle from Eric Jones and that tag was still on it when he got it.

Q Okay. I see, so---

A So it was not a DMV, I couldn't run the tag and get information from DMV, I ran the tag through our PISTOL system to obtain the information.

Q So the tag on the motorcycle on the day that this person attempted to elude you---

[p.31]

A Correct.

Q ---actually came back via your PISTOL to Eric Jones, is that correct?

A That's correct.

Q And you did not see the face of the person who was next to you?

A Right. I could not see it, that's right.

Q Okay. I got you. Now, you also said that when you ran the VIN on the motorcycle it came back stolen out of, was it New York or New Jersey?

A New York. Yes, sir, New York.

Q New York, okay. And you said a couple years. Was it more than a couple years?

A I don't recall how many exact years, I can maybe look in my notes. I don't know if I made notes of how many years ago it was, but it was several years ago. I would say at least, I say a couple, at least two, maybe three, I don't remember exactly.

Q Okay. And, in fact, the person who had owned that motorcycle actually had already settled it with State Farm, is that correct?

A That's correct, yes.

[p.32]

Q So State Farm had already paid it out, so the lien holder on the thing was actually State Farm at this point, is that correct?

A That's right, yes, sir.

Q Okay. Now you also said that Mr. Collins had a key to the motorcycle?

A That's right.

Q So, whatever he got from Mr. Jones, he probably got the key then, as well, is that right?

A I would assume.

Q Okay. And the key started the motorcycle?

A It turned it on---I don't know, I didn't start the motorcycle. It did turn it on. It had a digital readout on it when I turned the key, it would turn on, the digital speedometer would come up, everything lit up on the small dash on the motorcycle. And also gave me the mileage on the motorcycle, so I assumed it operated the motorcycle. I did not start it.

Q As part of your investigation, did you ever determine whether or not when the motorcycle had been stolen whether the key was with it when it was stolen?

A No, there was no key. I spoke with the owner, there was no key with the motorcycle.

Q Okay. So it was stolen without a key?

[p.33]

A That's right.

Q Mr. Collins had a key, and he had gotten the motorcycle from Eric Jones, is that correct?

A That's correct.

Q And throughout this whole time Mr. Collins denied knowing that it was stolen, is that right?

A That's right.

Q I have no further questions, Your Honor.

REDIRECT EXAMINATION

By: Mr. Casey

Q Officer Rhodes, you know something about motorcycles, you've ridden motorcycles and work in a unit that handles motorcycles.

A I actually don't ride motorcycles.

Q You don't ride motorcycles. But you work in a unit that uses a lot of motorcycles?

A Yes, that's correct.

Q If you don't have a key to the motorcycle---to a motorcycle do you just throw it away or is there something that you can do, in your training experience, to deal with that problem?

A Sure, you can replace the ignition and obtain a new key for the motorcycle and still make it operate with a

[p.34]

new---with another ignition. If you pull an old ignition out, same thing in a vehicle or anything, you can take out an old ignition, cut the wires and put everything back together and put a new ignition in it with a new key and still be able to operate the motorcycle.

Q I got you. Now, and in this particular case, counselor asked you about the conversation that you--- so you actually spoke to the owner of the motorcycle it was stolen from, is that right?

A Yes, I did.

Q And were able to verify that it had been stolen from him, is that right?

A Yes, that's right.

Q Those are the questions I have, Judge, thank you.

RECROSS-EXAMINATION

By: Mr. Weber

Q Your Honor, I have a quick follow up question. You indicated that Mr. Collins had used Jarman's to service that motorcycle?

A That's correct.

[p.35]

Q Or get new tires? Okay, was there any evidence that he had taken the motorcycle to Jarman's to get a new key or a new ignition system?

A I don't have that information, no.

Q Okay. I have nothing further. Your Honor.

MR. CASEY: That's all I have for this witness.

THE COURT: All right. Thank you, sir.

MR. CASEY: Call Officer Davis.

CHRISTOPHER DAVIS, having been so duly sworn, testified as follows:

DIRECT EXAMINATION

By: Mr. Casey

Q Good morning, sir, you are Special Agent Christopher Davis of the Department of Motor Vehicles?

A I am.

Q And, sir, were you so employed on the 10th day of September of this year?

A I was.

Q On that day did you have occasion to---excuse me, how long have you been working at the Department of Motor Vehicles?

* * *

VIRGINIA: IN THE CIRCUIT COURT OF ALBEMARLE COUNTY

Case No. CR13000672-00

[Filed December 18, 2013]

COMMONWEALTH OF VIRGINIA,	)
	)
v.	)
	)
RYAN AUSTIN COLLINS	)
	)
Accused.	)
	)

MOTION TO SUPPRESS

TO THE HONORABLE JUDGE OF THIS COURT:

Comes now the Accused, by counsel, and respectfully moves this Court to suppress any and all evidence obtained/seized by any law enforcement officer from the property located at 2304 Dellmead Lane, Charlottesville, VA on or about September 10, 2013 on the basis that the search and seizure was in violation of the Fourth Amendment of the Constitution of the United States of America and the Constitution of the Commonwealth of Virginia.

The Accused further requests that this court order any evidence improperly obtained be excluded from any trial of charges brought against the Accused as a result of the seizure of evidence; and further, that such improperly obtained evidence not be used for any investigative purpose, including obtaining derivative evidence.

RYAN AUSTIN COLLINS
By counsel

We ask this:

/s/Charles L. Weber
Charles L. Weber, Jr.
252 East High Street
Charlottesville; VA 22902
(434) 977-4054
Counsel for the Accused

* * *

[*Service Omitted in the Printing of this Appendix*]

VIRGINIA
IN THE CIRCUIT COURT FOR
THE COUNTY OF ALBEMARLE

Case No. CR13000672

Case No. CR13000673

[Filed April 22, 2014]

COMMONWEALTH OF VIRGINIA	)
	)
v.	)
	)
RYAN AUSTIN COLLINS	)
	)

COMMONWEALTH'S CONSOLIDATED OPPOSITION TO DEFENDANT'S MOTIONS TO SUPPRESS EVIDENCE

The Commonwealth of Virginia, by and through her counsel, Assistant Commonwealth's Attorney Elliott J. Casey, opposes the Defendant's motion to suppress evidence and respectfully requests that this Court deny the motion and rule that all evidence seized in the course of this lawful investigation be admissible at trial. As grounds for this opposition, the Commonwealth relies on the following points and authorities and such other points and authorities as may be cited at a hearing on the motion:

STATEMENT OF FACTS

On September 10, 2013, Officer David Rhodes responded to a call from the Albemarle County DMV that COLLINS was attempting to register a vehicle that was reported to be stolen. Officer Rhodes knew

COLLINS from a different case he was working involving a suspect eluding Officer Rhodes on a burnt orange and black motorcycle with an extended sway arm and chrome wheels on July 25, 2013. Officer Rhodes spoke to COLLINS at the DMV about the vehicle COLLINS was attempting to register. In the course of their conversation, Officer Rhodes observed several photographs posted on COLLINS' Facebook page. One of these photographs depicted the motorcycle involved in the July 25, 2013 eluding incident. In this photo, the motorcycle was in plain view in front of a particular house in an area that Officer Rhodes was familiar with due to his experience patrolling the area. The photograph also depicted the vehicle that COLLINS was attempting to register at the DMV. Officer Rhodes learned about the address of the house in particular from a CI. Officer Rhodes asked COLLINS about the motorcycle, and he said he knew nothing about the motorcycle or the house in the picture. COLLINS also stated that he had not ridden a motorcycle in a few months.

After COLLINS left the DMV, Officer Rhodes drove to Dellmeade Avenue; the street where he believed the photograph of the motorcycle was taken. Officer Rhodes observed a house identical to the house in the photograph, and observed a motorcycle partially covered by a tarp in plain view in the driveway of the house. From the public sidewalk, Officer Rhodes observed that the motorcycle under the tarp appeared longer than a stock motorcycle due to an extended sway arm, and had chrome wheels. From his experience on patrol, Officer Rhodes knew these features are rare and not often present on a typical motorcycle. Officer Rhodes proceeded to remove the tarp to examine the

motorcycle. Upon removal of the tarp, the motorcycle had the same burnt orange and black paint job as the motorcycle involved in the July 25, 2013 eluding incident. Officer Rhodes found and ran the motorcycle's VIN, which came back as being stolen.

Officer Rhodes then waited at a distance for COLLINS to come to the house. Officer Rhodes observed COLLINS come into the house. Officer Rhodes then knocked on the house's front door, and COLLINS answered the door. Officer Rhodes asked COLLINS about the motorcycle. After telling Officer Rhodes the motorcycle belonged to a friend, COLLINS changed his story and said he had gotten the motorcycle from Eric Jones.

Officer Rhodes had been given information from a CI that COLLINS had taken the motorcycle to Jarman's Sportcycles to get new tires. While Officer Rhodes was speaking with COLLINS, Officer Matt McCall verified with Jarman's that COLLINS had brought a motorcycle that matched the description of the motorcycle in question into Jarmans on September 2, 2013. Further, the records from Jarman's show that the order was placed by a "Ryan Austin," and the VIN was off by one digit from the motorcycle.[1] Officer Rhodes asked COLLINS about taking the motorcycle to Jarman's. COLLINS admitted to riding the motorcycle to Jarman's to get new tires. COLLINS also admitted that he used the tag of a motorcycle that he had

---

[1] The last four digits of the motorcycle's VIN are 1685. The last four digits of the VIN from the Jarmans' records are 1585. Officer Rhodes believes this discrepancy was due to an error in the entry of the VIN from a Jarmans' employee.

purchased and since sold on the motorcycle in question. He admitted that he bought the motorcycle in question from Eric Jones for $3500.

LAW AND ANALYSIS

I. THE VIN OFFICER RHODES FOUND ON THE MOTORCYCLE IN QUESITON SHOULD NOT BE SUPPRESSED BECAUSE OFFICER RHODES CONDUCTED A LAWFUL SEARCH WITHIN THE SCOPE OF THE FOURTH AMENDMENT

In the case at hand, Officer Rhodes had probable cause to believe that the motorcycle under the tarp was the same motorcycle involved in the eluding incident on July 23, 2013. The motorcycle in question was unique—it had rare components—chrome wheels and an extended sway arm, which caused the motorcycle to have a longer length than a standard motorcycle. Officer Rhodes observed this motorcycle in a photograph on COLLINS' personal Facebook account. The motorcycle was in the same photograph as the vehicle COLLINS was attempting to register at the DMV. Further, after Officer Rhodes drove to the house depicted in the photograph with the motorcycle, he observed from the public sidewalk in plain view a motorcycle under a tarp. The motorcycle was not completely covered, so from his vantage point on the public sidewalk, Officer Rhodes could tell that the motorcycle under the tarp had unique chrome wheels, and that the silhouette of the motorcycle was a longer length than a standard motorcycle. Since Officer Rhodes knew these components were rare, he had reason to believe that the motorcycle under the tarp was the same motorcycle in the Facebook photograph and the same motorcycle involved in the eluding

incident on July 23, 2013. In *Ornelas v. United States,* the Supreme Court described probable cause as "existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found."[2] In this instance, based on Officer Rhodes' knowledge that COLLINS was a suspect in the July 23, 2013 incident, the Facebook photograph of the motorcycle, and the unique characteristics of the motorcycle observable from the public sidewalk, probable cause existed that the motorcycle under the tarp was the same motorcycle used in the July 23, 2013 crime.

Since the motorcycle is considered an automobile for Fourth Amendment purposes, Officer Rhodes did not need to obtain a warrant before he removed the tarp to observe the vehicle's VIN. In *Carroll v. United States,* the Supreme Court found that vehicles are treated differently than stores, dwellings, or other structures for the purposes of the Fourth Amendment. 267 U.S. 132 (1925). There, the court found that since a "vehicle can quickly be moved out of the locality or jurisdiction in which the warrant must be sought," it is not practical to require law enforcement to secure a warrant, so probable cause alone is sufficient to justify a search of a vehicle.[3] This "automobile exception" to the Fourth Amendment has been interpreted broadly. The Supreme Court found that the *Carroll* automobile exception to the warrant requirement applies even

---

[2] 517 U.S. 690, 696 (1996).

[3] *Id.* at 153.

when there is not a direct threat that the vehicle will be moved from the jurisdiction.[4]

II. THE VIN AND COLOR OF THE MOTORCYCLE WERE FOUND THROUGH AN INDEPENDENT SOURCE

Further, even if Officer Rhodes' removal of the tarp is a violation of COLLINS' Fourth Amendment right against unreasonable searches and seizures, the evidence obtained from the removal (the VIN and the confirmation of the color of the motorcycle) should not be excluded because they were also obtained from an independent source. If the knowledge gained by the government came from an illegal search, the evidence is considered "fruit of the poisonous tree," and thus inadmissible as evidence.[5] However, the Supreme Court found the evidence can be admissible if it is also "gained from an independent source."[6] In this instance, even if Officer Rhodes did not remove the tarp, he would still have been able to discover that the motorcycle was the same motorcycle used in the July 23, 2013 incident through Officer Rhodes' conversation with COLLINS at the house as well as Officer McCall's review of the records at Jarman's. COLLINS voluntarily admitted to buying and riding the motorcycle after Officer Rhodes told him the

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[4] Chambers v. Maroney, 399 U.S. 42 (1970). There, the Court found that a search of a car without a warrant at the police station house was Constitutional under the *Carroll* doctrine.

[5] Wong Sun v. United States, 371 U.S. 471 (1963).

[6] Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

information Officer McCall had found at Jarman's. When Officer Rhodes asked COLLINS about the motorcycle at the house, at no point did Officer Rhodes tell COLLINS he had to answer the questions about the motorcycle. Everything COLLINS told Officer Rhodes about the motorcycle was as a result of COLLINS' free will. Further, Officers Rhodes had Officer McCall ask Jarmans about the motorcycle after receiving information that COLLINS took the motorcycle there from a CI. The employees at Jarman's gave Officer McCall the paperwork from when COLLINS brought in the motorcycle, which had the motorcycle's VIN and description. Because this information was also found using an independent source other than Officer Rhodes' removal of the tarp, it should not be suppressed from evidence.

CONCLUSION

WHEREFORE, the Commonwealth of Virginia respectfully requests that this Honorable Court deny the defendant's motion to suppress.

/s/Elliott Casey
Elliott Casey
Office of the Commonwealth's Attorney
County of Albemarle
410 East High Street
Charlottesville, Virginia 22902
(434) 972-4072
Fax: (434) 972-4093

/s/Eleanor Winn
Eleanor Winn
Third-Year Practitioner

* * *

[*Certificate of Service Omitted in the Printing of this Appendix*]

[COMMON EX. #4,
4-30-14 admitted Judge]

JARMAN'S SPORT CYCLES INC
2120 BERKMAR DR
CHARLOTTESVILLE, VA 22901
434-293-4406

Repair Order Invoice

R/O Number: 6618 Invoice Number: 92544
Date In: 9/2/2013 Today Date: 9/10/2013
Date Promised: 9/2/2013 Date Closed: 9/2/2013
Cashier: MICHAEL E CURRY JR

Repair Order For:

RYAN AUSTIN
1014 LONG STREET
CHARLOTTESVILLE, VA
h:4348828844

Units For This Repair Order

Service Writer: MICHAEL E CURRY JR

Year	Make	Model	VIN/ Serial No.	Key Rate	Board Miles
2008	SUZUKI		JS1GR7LA 882101585		12317

Job: **INSTALL NEW TIRES**
Job For: 2008 SUZUKI GSX-R 600
JSIGR7LA882101585

NOT PURCHASED FROM US

Labor Description	Job Code	Technician	Quantity	Line Total
		JOSEPH D EMANUELE	3 Hours	$180.00
			Labor Subtotal	**$180.00**
			Job Subtotal	**$180.00**
			Customer Job Totals Labor	**$180.00**
			Total of Customer Jobs	**$180.00**
			Other Charges	
			Shop Supplies	**$6.00**
			Repair Order Subtotal	**$186.00**
			Sales Tax	**$0.00**
			Repair Order Total	**$186.00**
			Total Amount Due	**$186.00**
			Cash tendered	**$186.00**
			Change Due	**$0.00**

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NO RETURNS ON ELECTRICAL PARTS!
THERE IS A 20% RESTOCKING FEE!
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VIRGINIA: IN THE CIRCUIT COURT FOR ALBEMARLE COUNTY

No. 1096-14-2

[Filed July 2, 2014]

COMMONWEALTH OF VIRGINIA,	)
	)
Plaintiff	)
	)
v.	)
	)
RYAN AUSTIN COLLINS,	)
	)
Defendant	)
	)

COURT PROCEEDINGS

Taken On

December 2, 2013
December 18, 2013
April 30, 2014
May 7, 2014

LANE'S COURT REPORTERS, INC
401 8th STREET NE
CHARLOTTESVILLE, VIRGINIA 22902

[p.2]

APPEARANCES:

Elliott J. Casey, Esq.
410 East High Street

Charlottesville, VA 22902
Attorney for Commonwealth

Charles L. Weber, Esq.
252 East High Street
Charlottesville, VA 22902
Attorney for Defendant

BEFORE: The Honorable Cheryl V. Higgins

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[p.3]

May 7, 2014 (Arraignment/Bench Trial/Sentencing)

WITNESSES

WITNESS (Commonwealth)	DIRECT	CROSS	RE-DIRECT	RE-CROSS
Eric Jones	17	22	37	
Matthew McCall	38	43	48	
David Rhodes	49	66		

WITNESS (Defense)	DIRECT	CROSS	RE-DIRECT	RE-CROSS
Kandace Beach	103	107		
Terri Roberts	109	115		

EXHIBITS

NUMBER	DESCRIPTION (Commonwealth)	RECEIVED AT PAGE
1	Photograph of Motorcycle	59

* * *

[p.11]

May 7, 2014

THE COURT: So, are we ready to proceed?

MR. CASEY: Yes, Your Honor.

THE COURT: So, let the record reflect this is the case of Commonwealth versus Ryan Collins. Mr. Collins is in the courtroom with his counsel, Mr. Weber, and Mr. Casey is here on behalf of the Commonwealth and I understood we were here for a bench trial. Is that still the case?

MR. CASEY: Your Honor, it is correct with respect to count one of the indictment, but with count two of the indictment I understand there will be a plea of guilty.

THE COURT: So, Mr. Weber, I think maybe the most efficient way to proceed would go ahead, have him

arraigned on count one, ask him the questions, and then proceed with count two?

MR. WEBER: Yes, Your Honor.

THE COURT: Okay. So, Mr. Collins, if you would come forward to that black recording device. I know there are two indictments but I have to ask you a separate set of questions, so we're just going to read the first indictment, proceed to trial, and then we'll address the second indictment.

MR. COLLINS: Okay.

[p.12]

THE CLERK: The grand jurors, impaneled, sworn and charged, in and for the body of the County of Albemarle, have found the following indictment against you. Ryan Austin Collins did unlawfully and feloniously, on or about September 10, 2013, buy or receive stolen property having a value of two hundred dollars ($200) or more belonging to another knowing at the time of receipt that the property had been stolen in violation of Section 18.2-108, Section 18.2-95 of the Code of Virginia, 1950, as amended. How do you plead to this indictment, guilty or not guilty?

MR. COLLINS: Not guilty.

THE CLERK: (Witness sworn)

THE COURT: Mr. Collins, I am going to ask you a series of questions to make sure you understand what you are charged with and what your options are. If you do not understand a question that I ask you, let me know and I'll try to rephrase it or you are welcome to

stop at any time and speak privately with Mr. Weber, okay? So, what is your full name?

MR. COLLINS: Ryan Austin Collins.

THE COURT: Mr. Collins, how old are you?

MR. COLLINS: I'm twenty-five (25).

THE COURT: And what is your date of birth?

MR. COLLINS: [redacted], 1989.

* * *

[p.17]

E. Jones - Direct

ERIC JONES, having been so duly sworn, testified as follows:

DIRECT EXAMINATION

By: Mr. Casey

Q Good afternoon, sir. Would you please introduce yourself to the Court?

A I'm Eric.

Q And what's your last name, sir?

A Jones.

Q And, Mr . Jones, you know---may I approach the witness, Your Honor?

THE COURT: Yes.

Q And also counsel?

THE COURT: Yes.

Q I'm going to show you a photograph that's marked as Commonwealth's Exhibit #1, and there is a motorcycle in that picture. Have you seen that motorcycle before?

A Yeah, I used to own it.

Q And do you recall about when it was that you owned the motorcycle?

A It was---I first got it in April, actually, it was March when I had it.

Q I'm sorry?

[p.18]

A March.

Q March? April or March?

A Yeah.

Q And is it of this year or last year?

A Last year.

Q Last year.

A Yeah.

Q And when you got it, did you buy it from someone?

A Yeah.

Q And when you bought it from someone, was there something kind of unusual or funny about the motorcycle?

A Yeah, it didn't have a title.

Q All right, and do you know---

THE COURT: I'm sorry, I didn't hear your answer.

A It didn't have a title.

Q And so do you know why it didn't have a title?

A Possibly stolen.

Q Possibly stolen or you knew it was---

A Yeah, yeah, it was stolen.

Q It was stolen.

A Yeah.

Q Do you know who it was stolen from?

A No, I don't.

Q Okay, and do you know how it was stolen?

[p.19]

A No.

Q Okay, but when you bought the motorcycle, it didn't have a title to it,---

A No.

Q ---and so you had it, and how long did you hold onto it? Do you recall?

A About a month-and-a-half.

Q Okay.

A Yeah.

Q And did you at some point then sell it to someone?

A Yeah.

Q And who did you sell it to?

A Sold it to Ryan.

Q And who is Ryan? Do you know his last name?

A Collins.

Q And when you sold it to Ryan Collins, did you sell it to him for money?

A Yeah.

Q About how much money?

A Eighteen-hundred (1,800).

Q All right, and when you sold it to Ryan Collins, did you tell him about the problem with the motorcycle, about it being stolen?

A Yeah, I did.

[p.20]

Q And did you talk to him about the fact that it didn't have a title?

A Yeah.

Q And what did he tell you in response to the fact that it was stolen and didn't have a title on it?

A It was supposed to be turning into a race bike.

Q Who was going to turn it into a race bike?

A He was.

Q All right, and did he talk to you about how he was going to turn it into a race bike?

A No.

Q All right. Did he talk to you about any plans that he might have for the motorcycle or any changes that he might make to the motorcycle?

A He said he might put a different frame on it.

Q Might put a different frame on it?

A Uh-huh (indicating yes).

Q Okay. So, when you sold it to him---now, can I ask you when you sold it to him, did it have a key? Did it have a key?

A Yeah, it had a key, yeah.

Q All right. When you bought it, did it have a key?

A Yeah.

[p.21]

Q Okay, but you sold it to him and do you recall when that was, more or less, at least---I know it was a while ago, but do you kind of remember?

A Well, yeah, it was last year---I kind of---I know I had it at Easter, last Easter I raced it at the track and then probably the end of April.

Q Okay.

A Yeah.

Q And when you say probably the end of April,---

A Around then.

Q ---are you sure about that or are you guessing or how---what do you---

A Around there somewhere, yeah.

Q Around there somewhere?

A Yeah, yeah.

Q Okay. The person that we've been discussing as Ryan Collins, is he in the courtroom today?

A Yeah.

Q All right. Could you tell the Court where he is?

A Right here.

Q If the Court would note for the record the witness identified the defendant.

THE COURT: The record will so reflect.

* * *

[p.34]

E. Jones - Cross

A I can't remember the exact date, but it was, I want to say two months after I got rid of the bike. He came up to my job at---when I worked at Collier's Towing.

Q So, two months after you got rid of the bike.

A Uh-huh (indicating yes).

Q So, that would have been---

A That was the first time that I talked to him.

Q That would have been June sometime?

A I would say around then.

Q Or July sometime?

A Around July, yeah.

Q Okay, July what?

A I don't---

Q Early July?

A I don't---

Q Mid-July?

A I don't know right off.

Q You don't know.

A No.

Q What did you tell him?

A I told him---

Q Did you tell him that you sold the bike to Ryan Collins?

A Yes, I did.

THE COURT: I'm sorry. Oh, ---

[p.35]

Q The very first time you talked to Officer Rhodes, you told him you sold the bike to Ryan Collins,---

A Uh-huh (indicating yes).

Q ---is that right?

A Yep.

Q Did you tell Officer Rhodes that you thought the bike had been stolen?

A Yeah.

Q At that time.

A Uh-huh (indicating yes).

THE COURT: I'm sorry. Can you---you have to answer yes or no, Mr. Jones, because we record the proceedings.

A Oh, okay, okay.

Q So, the question again was, the very first time you spoke to Officer Rhodes, did you tell him that you told Ryan Collins that the bike was stolen?

A Yes.

Q Okay, but you testified here today that you didn't say that. You just assumed it because it didn't have a title, is that right?

A Yes, I did.

Q All right.

A I figured, you know, it didn't have a title so I just assumed it was stolen.

[p.36]

Q And you spoke with Officer Rhodes a second time, is that right?

A Yes.

Q And did you tell him exactly the same thing the second time that you told him the first time?

A Yes.

Q Okay. Did Officer Rhodes inquire with you about an eluding charge?

A No.

Q Did he ever talk to you about eluding?

A No.

Q Did you ever attempt to buy the bike back from him?

A I thought about it, but I didn't.

Q Did you ask him about it?

A Yeah, one time I did.

Q You did ask him about it.

A Yeah.

Q When was that?

A Like, right after I sold it to him I wanted it back.

Q Nothing further, Your Honor.

THE COURT: Redirect, Mr. Casey.

[p.37]

E. Jones - Redirect

REDIRECT EXAMINATION

By: Mr. Casey

Q So, counsel asked you if you ever told the defendant in this case, Mr. Collins, that you knew the bike was stolen because you didn't know the bike was stolen, but you never talked to Mr. Collins about the fact that---or your belief that the bike was stolen.

A Yes.

Q Okay, that's it.

THE COURT: And what was that conversation?

A I told him, you know, the bike didn't have a title, that it's possibly stolen, I'm not, you know, for sure, but that's how I bought the bike with no title, so---like I was telling him, I assumed it was stolen.

THE COURT: So, I'm going to ask you if you will please wait outside the double doors, but please do not discuss your testimony with anyone.

A Okay.

THE COURT: Thank you.

MR. CASEY: Your Honor, since Mr. Jones is here from work,---

THE COURT: Oh.

MR. CASEY: ---and we're pulling him away from work, my request would be that Mr. Jones be released unless there's an objection from the defense.

[p.38]

M. McCall - Direct

MR. WEBER: Judge, I don't have any objection.

THE COURT: You may step down.

(Court discusses another case at this time)

(OFF THE RECORD)

THE COURT: So, we are back on the record in the case of Commonwealth versus Ryan Collins. Mr. Collins is in the courtroom with his counsel, Mr. Weber, and Mr. Casey is here on behalf of the Commonwealth and we are ready for the next witness.

MR. CASEY: Thank you, Your Honor. The Commonwealth calls Officer Matt McCall.

THE CLERK: (Witness sworn) You may have a seat.

MATTHEW McCALL, having been so duly sworn, testified as follows:

DIRECT EXAMINATION

By: Mr. Casey

Q Good afternoon, sir. For the record would you please introduce yourself to the Court?

[p.39]

A I'm Officer Matt McCall.

Q And, Officer McCall, you're employed with the Albemarle County Police Department?

A That is correct.

Q Were you so employed on the 10th day of September of last year?

A Yes, I was.

Q And on that date, did you have occasion to respond to the DMV located on Abbey Road here in Albemarle County?

A I did.

Q When you responded to the DMV here on Abbey Road in Albemarle County, did you have an occasion to speak to a gentleman named Ryan Collins?

A I did.

Q Did you know Mr. Collins before that day?

A I knew of him. I didn't actually---I don't know him but I knew of him. I recognized the name.

Q All right. Do you see Mr. Collins in the courtroom today?

A That's Mr. Collins seated right there.

Q If the Court would note for the record that the witness identified the defendant.

THE COURT: The record will so reflect.

[p.40]

Q So, Officer McCall, when you responded to the DMV, and just to be clear about this, were you investigating---we're also going to talk about a motorcycle in a minute, but were you investigating a motorcycle or were you investigating something different?

A I recognized the name over the radio and I responded up there due to the fact that I was given some information regarding a motorcycle that eluded me I guess several weeks, months, I don't recall the exact date, but he was a person of interest in that eluding.

Q All right, so when you responded to the DMV then, you located Mr. Collins and did you advise him of his rights under Miranda v. Arizona?

A I did. I pulled my vehicle up and eventually got out and activated my video camera and Mirandized him in front of my car.

Q Did he indicate whether he understood his rights?

A He did understand his rights.

Q And did he indicate whether he would be willing to speak to you?

A He did agree to talk to me.

Q And so did you have a conversation with him? I guess you had a conversation with him probably about a couple of different topics, is that right?

[p.41]

A That's correct.

Q All right. I'm going to jump forward if I can. I'm going to skip over the conversation you had about---anything about an automobile, like an Acura or anything like that,---

A Okay.

Q ---and, instead, I want to ask you in particular about, again, you responded that you wanted to talk to him about a motorcycle, any conversation you had with him about motorcycles.

A I did. I spoke to him about a motorcycle that I was interested---my line of questioning, more or less, went to the fact that I kind of knew he was the person who was driving the motorcycle on the date that this motorcycle eluded me on 29, went down Emmet, took a right on Angus and a left on Wayne and then I discontinued it at that point. That motorcycle driver had a tattoo on his left arm, full sleeve, was wearing yellow Timberland-type-style boots. I was not 100% that that was, in fact, Mr. Collins, but I indicated to him that I thought he was the driver of the motorcycle. He stated to me that he hadn't owned a motorcycle in months, hadn't driven a motorcycle in months, and that it was not him.

Q Did he ever---did he mention to you whether or not he had ever owned a motorcycle at all? And, in

[p.42]

particular, did he give you any detail about the way that motorcycle appeared, (unintelligible) color or something like that?

A He may have made a statement as far as owning a motorcycle, but I don't recall the color or anything like that.

Q Would it refresh your recollection if you were to look at your report?

A Yes, it would.

Q May I approach the witness, Your Honor?

THE COURT: Yes.

A (Reviewing) He said the last one he owned was green.

Q That's what he said?

A That's correct.

Q Officer McCall, those are the questions that I have for you at this point---oh, other than this. Did you participate at all in the investigation subsequently conducted by Officer Rhodes?

A I did. I was present when there was a motorcycle located on Dellmead Avenue in the city, but I didn't have any interaction as far as that was concerned.

Q All right, and those are the questions that I have for you, Officer McCall, but please answer any questions that Mr. Weber might have for you.

[p.43]

CROSS-EXAMINATION

By: Mr. Weber

Q Officer McCall, you indicated an eluding incident that occurred. Was that on June the 4th, 2013?

A I don't recall the exact date but it's possible.

Q Would it refresh your recollection if you looked at your notes?

A Sure.

Q (Unintelligible) notes.

MR. CASEY: May I approach, Your Honor?

THE COURT: Yes.

A (Reviewing) I don't see a date on this particular supplement that I completed.

Q But you didn't make any notes on the day that it happened?

A I can't recall. I may have done a report on it, but I don't have any record of it.

Q Did you talk to Officer Rhodes about it?

A Yeah, we did discuss that specific incident, but I don't recall exactly what the---

Q And he discussed his incident with you---

A Briefly.

[p.44]

M. McCall - Cross

Q ---(unintelligible) and you compared notes on that?

A We may have.

Q So, if he's testified that it was June the 4th, is that probably accurate based upon your---

A It could be. I'm not going to say it is, but it could be.

Q All right. I understand that. Now, the incident that occurred, what time of day did that occur?

A Are you talking about the eluding incident involving me?

Q Yes.

A Okay, that was during the daytime hours. I don't recall exactly what time it was.

Q Morning? Early afternoon?

A I couldn't tell you.

Q Okay, and you said he was on 29?

A That's correct, (unintelligible) right at the city/county line on southbound on Seminole Trail. The vehicle, actually, the motorcycle that was in question was orange or black. It had an extended frame on it. It went sideways and then when I activated my lights, it just took off.

Q Okay, had a helmet on?

A Yes.

[p.45]

Q But you are not able to identify who that was.

A Not 100%, no.

Q Okay. Were you present with Officer Rhodes when other suspects were developed in this case?

A The only time I was present with Officer Rhodes was at the DMV and then an address on Dellmead Avenue in the city.

Q Okay. Did you ever go with Officer Rhodes to interview anybody else regarding the eluding incident?

A Not to my knowledge, no.

Q Did you ever interview Eric Jones?

A No, I never spoke to Eric Jones.

Q He told you that the last motorcycle that he owned was green?

A That's correct according to my notes.

Q Okay, there's no green motor---you said you were present at Dellmead, is that right?

A That's correct.

Q Okay. How long did that encounter at Dellmead last, do you recall?

A I don't. I spoke to the officers that were there. Officer Rhodes was there. There were several other officers, you know, they pointed out a motorcycle that

was underneath a cover that had a chrome wheel that was visible.

[p.46]

After that I think I ended up leaving. Eventually I think I did go to Jarman's Sportcycles.

Q Okay, but you came back from there?

A I may have.

Q Okay, and so they were still there after you went to Jarman's and came back and they were still there?

A I'm trying to get my timeframe down. I can't---the timeframe's kind of fuzzy. I didn't really document much other than the interaction I had at the DMV so---I do know that I was there. I do know I went to Jarman's. I'm just am not sure exactly when, before and after, I'm not sure.

Q Okay, but when you came back, had he---was he already under arrest?

A I believe---my memory is fuzzy about that. I can't---I didn't make any notes. I'm not sure.

Q Did you transport him to the---

A I may have. I believe he was in the back of my car one time. I may have transported him, but I do remember him being in the backseat of my car.

Q Okay, and did you ever have any discussion with him in the car? Let me see if I can refresh your recollection. This is a day where it starts out and he's alleged to have tried to registered a stolen Acura,---

A That's correct.

[p.47]

Q ---is that right?

A That's correct.

Q And it turned out that was not true.

A That's correct.

Q Okay, and the next thing is is he's now being interrogated by you and Officer Rhodes about eluding, is that right?

A That's correct.

Q Okay, he wasn't arrested for eluding.

A That's correct.

Q And he wasn't arrested for receiving the stolen Acura.

A That's correct.

Q Ultimately, he was arrested for receiving a stolen motorcycle.

A By Officer Rhodes, yes, that's correct.

Q Okay, and did you ever hear him deny that he knew it was stolen?

A I can---he never admitted to knowing it was stolen, I can tell you that.

Q Okay.

A I would have made note of that, I'm sure.

Q You know that for sure.

A Yeah.

[p.48]

Q Pretty rough day for a guy to get charged with three separate offenses in one day, right?

A Well, I---well, being charged with one and accused of three, that's correct.

Q What's that?

A I said he was accused of three.

Q Right, okay.

A Yeah.

Q I gotcha. So, when you compared your notes with Officer Rhodes about the eluding, you concluded that it was the same motorcycle?

A Not 100% but there was an awful lot of similarities.

Q Awful lot of similarities, okay.

A That's correct.

Q I have no further questions, Your Honor.

THE COURT: Redirect?

REDIRECT EXAMINATION

By: Mr. Casey

Q Could you tell whether the person---when you talked about the eluding offense, and I know you're not

sure about the date or the time and you couldn't identify the person with 100% certainty. Could you tell whether the person was white or black even?

[p.49]

M. McCall - Redirect

A It was hard to tell (unintelligible) dark-skinned individual.

Q Thank you. That's all I have.

THE COURT: May this witness be released?

MR. CASEY: I would ask that he'd be released, Your Honor.

THE COURT: Any objection, Mr. Weber?

MR. WEBER: No objection.

THE COURT: So, you are free to go or welcome to stay in the courtroom. Please do not discuss your testimony with anyone.

A All right, thank you, Your Honor.

THE COURT: Thank you.

MR. CASEY: Officer David Rhodes.

THE COURT: If you'll remain standing at the witness box and raise your right hand.

THE CLERK: (Witness sworn) You may be seated.

DAVID RHODES, having been so duly sworn, testified as follows:

DIRECT EXAMINATION

By: Mr. Casey

[p.50]

D. Rhodes - Direct

Q Good afternoon, sir. For the record, would you please introduce yourself to the Court?

A Officer David Rhodes with the Albemarle County Police Department traffic unit.

Q And, Officer Rhodes, were you so employed on the 10th day of September of last year?

A I was.

Q On that day did you have occasion to respond to the DMV, the Department of Motor Vehicles here in Albemarle County on Abbey Road?

A Yes, I did.

Q And when you responded, did you have occasion to interact with the defendant in this case, Mr. Ryan Collins?

A I did, yes, I did.

Q Do you see Mr. Collins in the courtroom today?

A Yeah, he's to my left.

Q If the Court would note for the record the witness identified the defendant.

THE COURT: The record will so reflect.

Q Prior to this date, did you know Mr. Collins or had you seen him before?

A I had dealt with him, it had been some time, but I had dealt with him before, yes.

[p.51]

Q All right, but this particular day, you responded to the DMV. What was the---was there a particular reason for your response to the DMV?

A I went there. I had heard Mr. Collins' name across the police radio, and I had been wanting to speak with him in reference to a motorcycle.

Q Okay, so you responded to the DMV.

A I did, yes.

Q And when you got there, did you have a conversation with the defendant in this case?

A I did, yes.

Q Tell the Court, please, I understand there are two different issues here, so what I'd like you to do is---there is an issue involving a motor vehicle, an Acura, and we're not really dealing with that today, so what I'd ask you to do is to confine your conversation if we could to the conversation about the motorcycle---

A Right.

Q ---and what took place as far as your interaction with the defendant on the motorcycle, so if you'd please tell the Court about that.

A I'll back up a little bit and just give a little back story about this motorcycle. It was a motorcycle I attempted to stop on the 250 Bypass in Albemarle County in the area of Ivy Road, Old Ivy Road area, back on July 25th

[p.52]

of 2013. It came up behind me at a high rate of speed. It was the only vehicle around. It came up behind me and actually slowed down very quickly once it realized that it was---that they were coming up behind an unmarked police vehicle. I got a reading of one hundred (100) miles per hour in a posted fifty-five (55) mile per hour zone. I attempted to stop that motorcycle which then fled from me on the bypass. The motorcycle was directly beside me when I tried to stop. It actually came up to my left side at the driver's door, almost within length where I could reach out and almost touch the motorcycle beside my car. So, I had a very good, within a few feet, looking at this motorcycle, knew it was burnt orange with black with some black paint on it and chrome---the chrome swing arm and the chrome wheels were on it. And through my investigation, the tag that was on the motorcycle at the time when I tried to stop it came back not on file. Again, the motorcycle was directly beside me, so I was actually able to see the tag within just a few feet. That came back not on file. Through my investigation and looking into that tag I looked through our local computer, our PISTOL system, which is our local database within the police department, city, county, and university police departments, and put data into and was able to locate that tag had been on a motorcycle that Eric Jones had

been riding at a previous time and had been stopped. I was able, through

[p.53]

other information and talking to other people, developed Mr. Collins as being a suspect that may have been operating that motorcycle the day that I tried to stop it on July 25th, so, ultimately, I went to the DMV to speak with Mr. Collins in reference to that. While I was there, Officer McCall was there as well. He Mirandized Mr. Collins and he agreed to speak with us about any issue we needed to speak with him about, and during Officer McCall's conversation with him, I went on Mr. Collins' Facebook page, pulled up some pictures on his Facebook page that showed this motorcycle in a picture in the background of a picture that had this silver Acura that he was trying to register at DMV, basically showing that you had the silver Acura, there was a black Acura that Mr. Collins and I had talked about that he had just sold recently within a few weeks of that, and behind that black Acura was a picture of this motorcycle that I had been looking for. I took a picture of the picture. With my department cell phone I took a picture of the picture on his Facebook page and showed it to Mr. Collins. He told me he didn't know anything about the motorcycle and he had never seen the motorcycle before. I asked him if he knew what house that was---

THE COURT: I'm sorry, can you say---your voice trailed off a little.

A I'm sorry.

[p.54]

THE COURT: He said what?

A He told me that he had never---he didn't know anything about the motorcycle in the picture that I showed him and that he had never seen the motorcycle before. I asked him if he knew what house it was parked in front of and he told me no.

Q Now, when I ask you Officer Rhodes, and I'm now going to show you a photograph that was previously marked as Commonwealth's Exhibit #1, and I've shown it to defense counsel. Do you recognize what's in this photograph?

A That's the motorcycle that I attempted to stop on the bypass.

Q And this motorcycle is in a driveway. What is this residence?

A It's on Dellmead Avenue. It's twenty-three (23)---2304, and it's a duplex, B, as in boy, Dellmead Avenue.

Q And this is a true and accurate---this particular photograph, is this how the---ultimately we're going to talk about the motorcycle, you finding the motorcycle later on that day. Is this how the motorcycle appeared on September the 10th?

A Yes, it did.

Q Is this how the motorcycle appeared the day it fled from you?

[p.55]

A Yes.

Q And is this how the motorcycle appeared in the Facebook photograph that you saw and that you showed to the defendant?

A Yes, all the same.

Q In addition to that, you said there's a residence on Dellmead Avenue where you found this---the photograph that you showed the defendant from his Facebook page, what did you ultimately learn was that residence, the location of that residence?

A That's where he---my understanding was where he had been staying---

Q I guess my question---I'm sorry, let me rephrase my question. The residence where you found that---

A Yes.

Q ---this motorcycle, is that the same residence that was in his Facebook picture or a different one?

A I'm sorry, that was the same residence, yes, same residence in the Facebook picture as compared to what I saw there and what is depicted here.

Q In Commonwealth's Exhibit #1.

A That's correct.

Q Thank you. So, Officer Rhodes, you take a picture of this photo---you take a picture of this Facebook page, you show it to the defendant, you ask him, do you know

[p.56]

anything about this motorcycle? - and he says, no, and (unintelligible) residence and he says, no, so then do you continue to talk to him about motorcycles?

A Yeah, I asked him how long it had been since he had ridden a motorcycle and he told me a long time. I then asked him, how long was a long time? - and he told me a few months.

Q So, at that point then, having seen the photograph of this residence, and did you have occasion to then go to investigate where that residence might be?

A I did.

Q And, ultimately, where did that investigation take you?

A To Dellmead Avenue.

Q And, in particular, what location at Dellmead Avenue?

A 2304-B Dellmead Avenue.

Q All right, and is that either in the county of Albemarle or within three hundred (300) yards of the county of Albemarle?

A It is within three hundred (300) yards, yes.

Q So, you arrive at that location and when you arrive at that location, what do you see at that location?

A When I arrived, from the street, still seated in my car, I could see a motorcycle---it was obviously a

[p.57]

motorcycle that was covered up by a white cover. It was in the driveway behind a silver Toyota 4Runner and it was parked---appeared to be parked in the exact same spot, exact same angle as the photograph that I observed in the Facebook page of this residence.

Q And could you see any of the---what appeared to be a motorcycle at all?

A You could see the bottom part of the wheels. The wheels were chrome, like I said before, both the wheels, all the wheels were chrome. I could see the bottom part of about half, maybe a half or to a quarter of the wheels that were chrome sticking out from underneath the cover, which matched the description of the motorcycle I had been looking for from July 24---July 25th.

Q So, at that point then what did you do?

A I then went over to the motorcycle and I---well, before I did anything I actually went to the sidewalk and took a photograph with my phone of what the motorcycle looked like while I was standing on the sidewalk. Then I went---proceeded over to the motorcycle and pulled the cover up off of the motorcycle to investigate further to locate a VIN number or tag number or something like that.

Q And tell the Court, please, as you examined it, what did you find when you examined it?

[p.58]

MR. WEBER: Your Honor, just for the record I'm going to object based upon the hearing we had the other day, and I know the Court overruled us, but I just want to make a timely objection to make sure that any evidence that comes in from this point about that motorcycle is still under that objection.

THE COURT: So noted, Mr. Weber. You may continue, Officer Rhodes.

A I looked at the tag number on that motorcycle, and that tag number that was on the motorcycle is not the same tag number that was on the motorcycle the day I tried to stop it in July. I ran that tag through DMV, and it came back to an address out of Waynesboro on a 2004 Kawasaki that was showing a disposition of being sold. The motorcycle was identical to the motorcycle I had seen within just a few feet of my vehicle on July 25th. I knew with 100% certainty that that was the same motorcycle that day. It's very unique. It's stretched out. The swing arm in the back is chrome and it's stretched out. A lot of after-market parts have been put on the motorcycle, so it's not a standard motorcycle that you'd buy off the showroom floor necessarily. The chrome wheels, all the---it had very distinctive characteristics about it.

Q In addition to that, did you obtain the VIN number on the vehicle, on the motorcycle?

[p.59]

A I did, yes, I did.

Q And what happened as you investigated the VIN number?

A I ran the VIN number through the national computer, and it came back as stolen out of New York.

Q So, you've now looked at this motorcycle and, in particular, at this point then, again, is that the same motorcycle in this picture, Commonwealth's Exhibit #1?

A Yes, it is.

Q I'd ask for the admission of Commonwealth's Exhibit 1 at this time.

THE COURT: And the Court will note the continuing objection---

MR. WEBER: Ongoing objection.

THE COURT: ---by Mr. Weber. Eased upon the Court's prior ruling, the Court is going to overrule that objection and admit Commonwealth's Exhibit #1.

(Commonwealth's Exhibit #1 was so marked and received into evidence at this time)

Q So, then at that point, Officer Rhodes, did you continue on the property, or did you step back or do something else? What did you do at that point?

[p.60]

A I actually---believing that Mr. Collins was probably on the way to the residence and I wanted to speak with him, I actually left the residence and waited for him to arrive at the residence there.

Q And, in fact, did you observe him---at some point did you observe him at the residence?

A I didn't observe him there---yeah, eventually I did. I knocked on the door and he came to the door to speak with me.

Q And when he came to the door to speak with you---let me ask you. September 10th, what kind of day was it? Was it cold or was it warm or something different? Was it rainy?

A It was very warm that day. I remember it being actually hot, I would say in the mid-nineties.

Q And when the defendant came to the door, did you notice how he was dressed?

A Yeah, he was wearing a long-sleeved shirt, blue jeans, and tan Timberland-type work boots.

Q Did you recognize those boots? Had you seen boots like that before?

A Yes, the same---the same exact boots that the rider was wearing on the bypass the day I tried to stop the motorcycle on July 25th.

[p.61]

Q So, you knocked on the door, he comes to the door, and you see how he's dressed. Did you speak to him?

A I did.

Q And tell the Court, please, about the conversation you had with him at that point.

A I asked him if he knew anything about the motorcycle. He told me that he didn't know anything about it, and then he changed his story several times throughout our conversation. He told me it was a friend's motorcycle, and eventually he had gotten to the point where he actually---I asked him where he had gotten the motorcycle and he told me that he had bought it from Eric Jones. When I asked him when the last time was he had ridden the motorcycle, he told me about a week ago from his mom's house on Northfields to Dellmead Avenue.

Q Did you then ask him whether he had ever taken it any other place?

A Yes, yeah, I asked him if he had taken it anywhere else and he told me that---initially he told me, no, he hadn't taken it anywhere and then later on he told me that he---once I confronted him with the Jarman's information that it had been taken to Jarman's---the information I had that he had taken it to Jarman's for some work to be done on it, he then told me, right, he admitted then that he

[p.62]

had taken it to Jarman's to get new tires put on the motorcycle after he left his mother's house with it.

Q And did he tell you how recently it was or roughly how recently it was that he had taken the motorcycle to Jarman's to get the titles---to get the titles---to get the tires put on it?

A I'd have to refer back to my notes. It was the same day---he told me it been months since he ridden

at the DMV and then he told me that it had been a few weeks,---

Q Okay.

A ---a few weeks ago when he took it from his mom's house in Northfields and then he went---he's saying then at that point he went from Northfields to Jarman's to get the tires put on it.

Q Now, Officer Rhodes, you had also indicated that when you examined the motorcycle this time, on September the 10th, that it had a tag on it that was different than the tag you had seen before and that this tag came back from another vehicle, so did you ask the defendant about that tag and about the issue about it coming back to another vehicle?

A I did and he told me that it had been on another motorcycle that he had sold.

Q Did he tell you what kind of motorcycle it was or anything about the motorcycle that it was?

[p.63]

A It was a Kawasaki.

Q Did he give you a color or anything?

A I don't recall a color, no.

Q Did he---oh, so at some point then did you arrest him?

A I did.

Q And when you arrested him, did you conduct a search incident to arrest?

A Yes, I did.

Q All right, and pursuant to the search incident to arrest, did you find anything on his person that was notable?

A Yeah, there was a key in one of his pockets and that key then worked the motorcycle. I took the key out of his pocket. it appeared to be a motorcycle key, went over to the motorcycle. The motorcycle has a digital speedometer, a digital readout on it, put the key in the ignition, turned the key on in the ignition or the digital readout and everything came on on the motorcycle as if it had been operated. I didn't start it, but it operated it up to that point.

Q Now, Officer Rhodes, you had indicated, too, also that you had received a response from the National Criminal Information Center regarding the status of the stolen---status of the motorcycle as how it had been stolen.

[p.64]

A That's correct.

Q And so were you able to determine when it was that the motorcycle had been stolen?

A Let me look back. I don't know if I've got a date on here. It had been some time back. I don't remember exactly the year. I don't have it in my report. I could probably find it in some other notes I have, but I don't have it in my report.

Q Let me ask you this, Officer Rhodes. Are we talking about a matter of months or a matter of years?

A Oh, I think it had been a couple years.

Q Okay, and the reporting party, were you in contact with the reporting party?

A I did contact the owner of the---the registered owner of the, I'm sorry, the reporting party that had reported the motorcycle stolen out of New York. I did actually speak with him on the phone. He told me that the motorcycle had been taken some time back and had since been settled by State Farm Insurance.

Q And incidentally, Officer Rhodes, when you spoke to him, did he indicate to you whether the vehicle when it was stolen had a key or not?

A He did, but let me look back. There was no key---there was no key with it when it was stolen.

Q No key with it when it was stolen.

[p.65]

A Correct.

Q Officer Rhodes, did all these events take place here in Albemarle County or, again, (unintelligible) within three hundred (300) yards of Albemarle County?

A Yes, it did.

Q Those are---sorry, the Court's indulgence. Those are all the questions that I have for you, Officer Rhodes, but please answer any questions that Mr. Weber might have for you.

THE COURT: Cross-examination.

MR. WEBER: (Inaudible) the photograph of the (inaudible)?

MR. CASEY: The one that I just moved in?

MR. WEBER: No, the one with the eluding.

MR. CASEY: Oh, you know, that's part of the evidence from the---so you would have to get it from the Court, I'm sorry.

MR. WEBER: Okay.

THE COURT: What would you like, Mr. Weber?

MR. WEBER: There was a photograph of the motorcycle racing away from Officer Rhodes.

MR. CASEY: From the motion to suppress.

THE COURT: Yes.

MR. WEBER: I'd like to get that if I could.

[p.66]

CROSS-EXAMINATION

By: Mr. Weber

Q Officer Rhodes, you indicated that you heard Mr. Collins' name on the police radio regarding an incident that was going on at DMV, is that right?

A That's correct.

Q And you went over there to investigate the eluding charge, is that right?

A That's right.

Q You were not dispatched to deal with the other issue.

A No, no, sir, that's right.

Q The other issue was registering a silver Acura, ---

A That's right.

Q ---is that right? And that, too, came back stolen.

A That's correct.

Q Okay. Later that day you determined that car was not stolen, is that right?

A That's right.

Q All right, so that's off the table, but at the time when he was up there at DMV, he's dealing with probably at least four different officers up there, is that right?

[p.67]

D. Rhodes - Cross

A Somewhere in that neighborhood, yes, sir.

Q And focused primarily on the issue of this Acura being stolen, is that right?

A Well, we talked---we talked about a whole gamut of things, but, yes.

Q Okay, so you go up there and you want to talk to him about an eluding issue that occurred on July the 25th.

A That's correct.

Q And you went up there with Officer McCall. Did he arrive separately or---

A Separately, yes, sir.

Q Okay, but you and he had talked before about the eluding that occurred with him, is that right?

A simultaneously, but, yes, yes, we had talked before that.

Q Different eluding incidents---

A Right.

Q ---but his incident was on June the 4th.

A That's correct.

Q Yours was on July the 25th, is that right?

A That's correct.

Q That's your recollection, those two dates, June 4th and July the 25th, is that right?

[p.68]

A As far as I know, yes. I'm not a 100% sure of his date, but I believe that sounds correct. I'm not a 100% sure of that but that sounds right.

Q All right. Now, the---I'm going to show you what was marked as Defense Exhibit 1, and it was admitted back last week during the hearing on this matter. Do you recognize that photo?

A I do.

Q Could you tell the Court what that photo is?

A That's a picture of a paused video on a computer, probably at the police department, I'm not sure where it was where I played it and took that picture, but that's a video, my in-car video paused and then me taking a photograph of that paused video.

Q All right, so my question for you is, when you went up there to the DMV, did you show him that photograph?

A Yes, I did, on my phone. Yes, I did.

Q You did.

A Uh-huh (indicating yes).

Q You showed them the photograph and you told him you were investigating an eluding charge on a motorcycle and you showed him that photograph, is that right?

A That's correct. That's right.

Q Okay. Now, you're pretty thorough in writing your reports, right?

[p.69]

A Uh-huh (indicating yes).

Q Pretty thorough when you testify here in court, is that right?

A Uh-huh (indicating yes), correct.

Q Okay. In your report you describe going back to your car and getting Facebook photos.

A It wasn't my car, but, yes, I went to a vehicle, yes.

Q But you describe getting Facebook photos---

A That's right.

Q ---and you took them on your phone and you showed him those photos, is that right?

A That's correct.

Q And then in your report you mention that you showed him the photos from the Facebook page.

A That's correct.

Q Okay, and then you ascribe to him certain statements he made about motorcycles,---

A Right.

Q ---is that right? Okay, but in your report you never mentioned that you had showed him that photograph, did you?

A No, I didn't.

Q You didn't put that in your report.

A Right.

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Q Okay, but that's what he was responding to saying, I was not---that's not me. I was not eluding, is that right?

A Presumably, yes.

Q Okay, and you also testified in at preliminary hearing in the General District Court, is that right?

A That's correct.

Q You testified consistent with what's in your report.

A Correct.

Q Okay, and you testified about showing him the Facebook photos. The Facebook photos were a still photograph around---of Dellmead, is that right?

A That's correct.

Q Okay.

A It turned out to be, yes.

Q Okay, and had the black Acura in one photograph and had the silver Acura in another photograph, is that right?

A Yeah, one photograph actually had both vehicles---had both vehicles in one photograph.

Q You think both of those vehicles were in one photograph?

A Yes.

Q You're absolutely certain?

[p.71]

A Pretty certain. I'd have to look back at the photographs that I entered into evidence, but I'm pretty certain, yes.

Q Okay. I just want to make sure, but you ascertained that from the photograph. You didn't see those vehicles there that day.

A No, I didn't see either one of those vehicles there, but what I'm saying is the photograph---you're asking about a photograph and the photograph that you're asking me about you said had one of those vehicles. I'm saying that one of those photographs had both vehicles in it.

Q I gotcha, okay. What I'm getting at is at the General District Court, you also never mentioned that you had showed him that photograph, did you?

A I don't recall, I'm not sure.

Q The first time you mentioned---the first time anybody ever knew that that photograph was shown to Mr. Collins at DMV and he was responding to that photograph was when I cross-examined you one week ago, is that right?

THE COURT: Repeat your question, Mr. Weber.

Q I'm asking---

THE COURT: The first time---

Q The first time that anybody's ever known publicly that that photograph was shown to him was when I cross-examined him one week ago in this court.

[p.72]

THE COURT: The picture that is now in front of the officer.

Q That is correct, the picture of the eluding.

THE COURT: Thank you.

A I don't recall. I can't recall whether I said it in General District Court or not. I'm not sure. I did show him the photograph, but I don't recall if I said that in General District Court or not.

Q If I showed you the entire transcript, would you want to read the transcript?

A I'd be more than happy to read the transcript, but I'm telling you I don't remember if I said that or not.

Q Okay. You were trying to get him to admit that he was eluding, were you not?

A Sure.

Q That's what you wanted to do.

A Absolutely.

Q That's what you were pressing him on.

A Absolutely. I was doing a police investigation. That's exactly right.

Q All right, and when you confronted him at Dellmead, now you've got him confronted with the motorcycle. You're still pressing him on the eluding, aren't you?

A Yeah, absolutely.

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Q Okay, in fact, it took some time before you even figured out that that motorcycle was stolen, right?

A Sure, I had to confirm that.

Q You had to confirm that so what you're pressing him on is the eluding charge, and he's responding---

A I'm not sure of your—I don't understand your question.

Q You're pressing him on an eluding charge, in other words, you're telling him that you want him to admit that he was eluding.

A I did ask him that, yes, and yes.

Q Okay, so when you---you arrested him, is that right?

A That's correct.

Q Okay, and eventually you realize this is the same day, that you've been to DMV, been charged with or alleged to have tried to register a motor vehicle that was stolen, is that right?

A Correct.

Q And he's got you on his back alleging that's he's eluding him, that he was eluding you, is that right?

A Okay.

Q Okay, fair enough?

A Okay.

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Q Now, you arrested him and had you revealed to him prior to that arrest that that motorcycle was stolen?

A I don't understand your question.

Q Isn't it true that you arrested him and Mr. Collins says, for what?

A I don't believe so.

Q And you said, for receiving stolen property, isn't that right?

A I don't recall the whole---the exact events and how that all occurred, but I told him he was under arrest.

Q Do you remember saying that---but I just got word that the motor vehicle wasn't stolen. Did you say those words?

A I don't recall that.

Q You don't recall that.

A Are you saying---you're talking about the motor vehicle. Are you speaking of the motorcycle or---

Q I'm talking about---I'm talking about his comment when you arrested him.

A I don't understand your question is what I'm trying to get at.

Q The question is---

A Are you talking about the motorcycle or the motor vehicle at DMV? That's why I don't understand what you're saying.

[p.75]

Q Okay, I'm talking about the arrest.

A Okay.

Q Okay, you said, put your hands behind your back, you're under arrest.

A Right.

Q And he says, for what? And you said, for receiving stolen property.

A Right.

Q Is that right?

A It sounds right.

Q And he said---isn't it true that he said, but the motor vehicle, I just got word it was not stolen.

A I don't recall what he said at that point.

Q You don't recall him saying that?

A I don't recall what he said at that point.

Q Did you then tell him that it was for the motorcycle, not the motor vehicle?

A Sure I would have, absolutely.

Q Okay, so that's when you told him that it was the motorcycle, not the motor vehicle.

A Sure, absolutely.

Q All right. You didn't tell him that it was---that the motorcycle was stolen prior to putting handcuffs on him and arresting him, is that right?

A I don't think so, no.

[p.76]

Q Okay. Now, we had talked earlier, and you had talked about, you know, the investigation of trying to develop suspects for this---for the eluding charge and, ultimately, you ended up on September 10th, you developed Mr. Collins as a suspect in the eluding charge, is that right?

A I developed Mr. collins as a suspect in the eluding charge prior to September 10th. That wasn't---

Q Right.

A It was much prior to that.

Q I understand that, and I asked you in the hearing last week if you had gotten that information from Eric Jones, is that right? You said no.

A Right, I did not.

Q So when you first spoke to Eric Jones, Eric Jones did not tell you that he sold the motorcycle to Ryan Collins.

A I did not speak to Eric Jones myself. Another officer spoke with him. I never spoke with him until later.

Q Did the information that he sold it to Ryan Collins come to you via the other officer?

A It did. Yes, it did.

Q Did he tell---

MR. CASEY: I would object to this as outside of the scope, and it's---I don't know what the relevance would

[p.77]

be as far as cross-examination, Your Honor. If he wants to put on evidence in his case-in-chief, that might be a different issue, but---

Q Your Honor, part of it has to do with what Mr. Jones said.

THE COURT: But if Mr. Jones, though, didn't say it to this officer, correct?

Q I'm saying that he---he said he talked to Mr. Jones prior to the September 10th, is that true?

A I spoke with Mr. Jones before Sept, let's see. I don't remember when I spoke with him. I did speak with him, but I don't recall whether it was before September 10th or after Mr. Collins.

Q How many times did you speak to Jones?

A I think one time as far as I recall at the wrecker yard.

Q Okay, so you didn't speak to him before September 10th, is that right?

A I don't believe so, no. I don't remember the exact date, but I can't recall for sure. I can't remember if it was, see, I think I spoke with him after the arrest was made to try to track the vehicle back where it came from.

Q Well, let's go back.

THE COURT: So, now I'm going to sustain Mr.

[p.78]

Casey's objection. Well, I take that back. Because this is going back to establishing the bike was stolen from New York, I'm going to grant some leeway at this point, though Mr. Casey is correct. He did not get into the detail of the conversation with Mr. Jones, but you may continue, Mr. Weber.

Q On July 25th, you ran the tag.

A That's correct.

Q And the tag came back no longer active.

A Correct, not on file.

Q And you found Eric Jones associated with that tag number through your independent database called PISTOL, is that right?

A That's correct, that's right.

Q Okay, and you said that came back associated with Jones from several years prior?

A I don't remember exactly the exact amount of time in the past, but, yes, prior to July 25th. I don't remember the exact time, but, yes, it had been a couple years I think as best I recall.

Q So, a couple of years, though. Not---it wasn't, like, a couple of months.

A Yeah, yeah, I believe it was a couple years, best I can recall, but that's been awhile.

[p.79]

Q So, that tag is associated with Eric Jones for at least a couple of years prior to September---or July 25th.

A Let me make sure I stated correctly. He was stopped with that tag on another motorcycle a few years prior to that. I don't know how long the association was with Mr. Jones after that stop. There's no other information after that. I'm just making sure that you understand it was prior to that. A few years prior to that he was stopped on a motorcycle with that. I don't know if he got rid of that tag that day or if it was still, you know, I don't know how long he was associated with that tag is what I'm saying.

Q I understand. That tag was associated with Mr. Jones a couple years prior to---

A That's correct.

Q ---July 25th.

A That's right.

Q So, how long after July 25th did you talk to Mr. Jones?

A I don't recall.

Q Did you---obviously, you must have thought he was a suspect in the eluding.

A I didn't---but that's what I'm saying. I didn't personally talk to Mr. Jones. Another officer that

[p.80]

knows Mr. Jones spoke with him. I did not personally talk to him at that point.

Q Okay. Do you remember testifying here just last week---

A Uh-huh (indicating yes), I do.

Q ---about whether you talked to Mr. Jones?

A Uh-huh (indicating yes), I do.

Q Okay. Do you remember me asking you, did you try to develop suspects? - and you said yes.

A Uh-huh (indicating yes).

Q Do you remember me saying, and it would be reasonable based on your investigation of the tag number that Eric Jones was a suspect and you said, sure.

A Uh-huh (indicating yes).

Q You remember that?

THE COURT: I'm sorry, Officer Rhodes, you have to answer yes or no.

A I'm sorry, yes, yes, that's correct.

Q I'm on page 32, by the way, and I said, did you talk to Eric Jones on July 25th? - and you said, I did. He told me he sold the motorcycle, and I said, when did you talk to him? - and you said, well, I don't recall the date. Was it before or after you arrested him? - and you said, both. I've spoken with him after and I've also spoken with him before.

[p.81]

A Correct.

Q This was before and after September 10th.

A That's correct, and I probably misspoke on that that I got the information from another officer and I should have said that. Officer Jameson actually spoke with him after the July 25th because he knows him.

Q When did you misspeak? Did you misspeak last week when you said you spoke to him before, or did you misspeak today when you said you didn't speak to him before September 10th?

A I have spoken with him---the other issue I run into is I've spoken with him because I also have a professional relationship with him because he's a wrecker driver, so I see him on a regular basis, so I don't---it's hard for me to recollect exactly when I spoke with him about the motorcycle, whether it was before this date or after that date and when I spoke with him, because I've spoken with him multiple times since that and I speak with him regularly---

Q I understand that.

A ---because I'm a traffic officer, so I work a lot of crashes. So, as far as being able to say I spoke with him on this date or that date or whenever, I cannot recall exactly when I've spoken with him about the motorcycle---

Q Okay.

[p.82]

A ---and I just can't.

Q But it's fair to say that the first time you spoke to Mr. Jones, he didn't tell you that he had sold the vehicle to Ryan Collins, is that correct?

A I don't, I honestly, I just don't recall. I don't recall.

Q Well, you recall when I asked you if you had gotten the suspect information from Eric Jones, is that right?

A I did not get the suspect information from Eric Jones.

Q You did not.

A No.

Q Okay. When you spoke to Eric Jones, did you speak to him about that eluding charge?

A I don't recall, to be honest with you, I don't recall.

Q Officer Rhodes, you're investigating an eluding charge and the motorcycle comes back---the tag comes back associated with Eric Jones. Did you speak to Eric Jones about eluding or not?

MR. CASEY: Well, again, I think we're getting into content now. Now, we're beyond the situation of stolen property, and now we're on the issue of having the conversation with Mr. Jones. If the concern is, I want a prior

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inconsistent statement or examination of a prior inconsistent statement from Mr. Jones, Mr. Weber is

certainly entitled to do that in his case-in-chief, but that would not---now is not the appropriate time.

Q Your Honor, this all goes to Officer Rhodes' recollection of events. He's conveyed information about what Mr. Collins has said and, obviously, this Court is going to take what he says as true. I'm trying to point out that there's a lot of ambiguity here, ambiguity in the fact that he never mentioned the fact that he had shown him the eluding motorcycle, and now we've got whether he talked with Eric Jones. Eric Jones was clearly a suspect. He knew that. I'm trying to determine, you know, what Eric Jones told him. Eric Jones just testified in this court about certain things, and I think what he says about what Eric Jones says is at least relevant to what Mr. Jones said.

THE COURT: I agree, but in your case-in-chief, not through cross-examination, so the Court's going to sustain the objection, but we'll order Officer Rhodes to remain so that you can put him on for rebuttal purposes.

Q Well, I also want to point out that these are things that he said in court, that he had spoken to him prior to September 10th.

THE COURT: I agree and those---

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Q And that's different from what he has said here today.

THE COURT: I agree.

Q All right.

A I will---I will say, Your Honor, just to apologize. I'm actually sick and have been on medication, so I'm a little bit---I was at the doctor this morning so I do apologize for being somewhat out of it. I do feel somewhat out of it, so, I'm sorry.

Q I want to talk about the, again, the investigation. I had asked you several times about whether you had--- as you developed Mr. Collins as a suspect, did you ever try to go to his house and confront him about the eluding, is that right? Do you remember that?

A I do.

Q Okay, and you said that you---in the case here last week, you said that you had been by his house one time but had never gone to the door.

A That's correct.

Q That's what you said, okay? Now, do you remember testifying at the General District Court?

A I do.

Q Okay. Do you remember I asked you the same sequence of questions.

A Okay.

[p.85]

Q Okay, so---

MR. CASEY: Your Honor, I'm just asking to object to this point so the---what I'm trying to---I think what counsel is trying to do is, again, this is outside the scope of the direct examination, so what counsel is doing now is attempting not to impeach the witness

with a prior inconsistent statement, inconsistent with something he testified to on direct but, instead, is now bringing up an extrinsic fact that the witness has testified to, getting the---confronting the witness with that extrinsic fact and then saying, oh, isn't it---I guess presumably you're going to say, isn't it true you said something different at another time? I don't see how he's permitted to do that. It's not impeachment of what he's testified to on direct. It's some external impeachment of something else.

Q It's impeachment of the investigation, and he said he was investigating an eluding, okay? I think it is proper cross-examination to talk about anything that he did to investigate the eluding charge even if it means pointing out some prior inconsistent statements. He testified he's investigating. That's proper cross-examination.

THE COURT: I'm looking at my notes and he talked about the back story, so he gave that explanation, and then it went almost immediately into the conversation with the defendant on the day that he was at DMV and then the time

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that he was thereafter at the house. I'm going to overrule the objection, but on a limited basis. So, you may ask your question.

Q Do you recall me asking the same sequence of questions about visiting Mr. Collins' house as part of this investigation in the General District Court at the preliminary hearing?

A I recall you asking me that, yes.

Q Okay. Do you recall me saying on July 25th up through September 10th, did you ever attempt to go visit him at his house?

A Yes.

Q Do you remember you saying several attempts, yeah?

A Right.

Q Okay, and then I said, did you ever, and then you cut me off and you said, never---we went by the house and there was never anybody there. Nobody would come to the door, and then you said, I didn't personally do that. I did that one time and another officer did it on an evening shift one time.

A That's correct.

Q Okay, and then I said---I questioned again. So, you're saying that from July 25th to September 10th you went by several times to his house and nobody was there, and

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you said, I went by, drove by there twice, I went one time to the door and another officer went one time to the door, I think it was once or twice. Do you recall those answers?

A Something like that, yeah, sounds right.

Q And you're saying---okay, and you were saying nobody was there. We never---I don't know if anybody was there or not, but there was no response.

A Okay.

Q So, in the General District Court you said you drove by there once and you went to the door once.

A Okay.

Q And last week you said I never went to the door, so which is it? Did you go to the door or you didn't go to the door?

A I don't recall, to be honest with you, I just don't recall. I know Officer Hooper went by there a couple of times for me. I went---I believe I went to the door one time. I drove, made several loops through the neighborhood looking for the motorcycle, trying to catch the motorcycle outside or somewhere I could see it, and I recall going to the door, but I don't remember the sequence of events of how many times or who went and all that. I don't remember that.

Q This all occurred between July 25th and September 10th, though?

A Correct.

[p.88]

Q Okay.

A Yeah.

Q All right. You also testified here that you, while you were talking to Mr. Collins at DMV, you went back to your vehicle or somebody's vehicle---

A Uh-huh.

Q ---and you took photographs from his Facebook page,---

A That's correct.

Q ---is that right? And those pictures that were on his Facebook were there on September 10th, ---

A That's correct.

Q ---is that right? Because you took photographs of them and showed him there on September 10th, ---

A Right.

Q ---is that right? Now, that, too, is different from what you testified to in the General District Court, is it not?

A At some point in time they had been taken down from his Facebook page, and I think that's what you're alluding to. They had been taken down from his Facebook page, and I'm not sure when that was or what timeframe that was. I was given information by a third party that they were taken down, so I don't know---they were there on September 10th and I don't know where they were prior to that.

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Q Okay. Let me go through the sequence of questions here---

A Okay.

Q ---and see if you can recall those answers, okay? And I asked you, okay, now, you said that while you were having contact with him, you went on his Facebook page and developed information about where the motorcycle was and all that, and I said, you had not done that anytime prior to September 10th, question mark. And you said, I had done that, however, the

pictures were of the information that I had received, I didn't personally see, I didn't personally have access to his Facebook page, but I know somebody that does and the pictures he initially had on his Facebook page, my understanding was that they had been removed right after July 25th. Do you remember saying that?

A Right, yes, that sounds right.

Q Right after July 25th, so (inaudible)

A That's correct.

Q Okay, and what I---and then you would answer, but, no, no, I did not make any attempt to do that between those two dates because they had been removed is what I was told. I didn't have access to his page.

A That's right.

Q You were referring to between the two dates, July 25th and September 10th.

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A Okay.

Q Is that right?

A Sure, yeah.

Q Okay, all right, and I said all right, but somebody in your unit did have access to his page, and you said, that's correct. Do you remember that?

A Uh-huh (indicating yes).

Q I said, okay, but you didn't ask that person to check his Facebook page prior to September 10th? - and you said, I had and the pictures had been removed.

A Right.

Q Okay, so prior to September 10th, you told the Court that those pictures had been removed.

A Right.

Q And here you're saying on September 10th the pictures were there.

A No, no. I'm saying prior to the date of September 10th---that's not what I'm saying. What I'm saying is prior to the date of September 10th, I was told they were removed. I personally did not see that information or get that information. That was given to me by a third party. On September10th those pictures were on his Facebook page. When they came back on there, when they were gone, and when they were removed, I couldn't tell you. I don't know that. All I can say is on September 10th those

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pictures were on his Facebook page. When they came off, I don't know.

Q Okay, but you testified that they came off shortly after July 25th, but before September 10th.

A Right. What I'm saying is, though, I know they were there on September 10th, which is what we're speaking of, and I don't know after July 25th I was told, but I cannot personally say that I know that for a fact because that's not my---I didn't see it myself, so all I'm

saying is that the third party told me that those pictures were removed after July 25th, like you said, but I know on September 10th they were there. What happened to them after July 25th and between that time and that September 10th, I don't know.

Q You don't know that those pictures were there on July 25th, do you?

A No, I don't know.

Q You never saw them there.

A No, I did not. I never said that I did, no. I did not say I did.

Q The first time you saw those photos was on September 10th.

A That's correct.

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Q Okay. You mentioned that at the time of his arrest he had on jeans, tan work boots, and a long-sleeved shirt, is that right?

A That's correct.

Q And when he was at DMV, he had on that same long-sleeved shirt.

A No, he didn't because he---when I reviewed the video, you can see his sleeve tattoos on both of his arms or at least one of his arms. He has a sleeve tattoo I think on the left arm, I can't recall for sure, but on one arm he's got a large tattoo on his arm.

Q Do we need to show this video, Officer? I watched the video, too, and it's a sweatshirt with a hood.

MR. CASEY: Your Honor, now he's arguing.

THE COURT: I agree.

Q When you confronted him at Dellmead, did he say where he was going?

A No.

Q Did you ask him where he was going?

A I don't recall if I did or not.

Q Did he come to the door in response to your knock, or did he come outside while you were around the motorcycle?

A He came to the door in response to my knock.

Q Do you know what a grudge bike is?

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A A what?

Q A grudge bike?

A I have no idea, never heard of it.

Q You never heard of a grudge bike?

A No, sir.

Q Okay. Let me ask you this. Are racing bikes required to be registered?

A Are racing bikes required to be registered? If they're operated on the highway, they have to be registered.

Q Okay, but if they are operated solely on the racetrack, they are not required to be registered.

A I don't know. That's private property. I'm not sure. I wouldn't think so.

Q Okay. He made no statement that indicated that he knew that bike was stolen.

A No, he did not.

Q Nothing further, Your Honor.

THE COURT: Redirect.

MR. CASEY: No, Your Honor, thank you. The Commonwealth rests.

THE COURT: And may---oh, if you'll step down and wait outside, please. Evidence or motions, Mr. Weber?

MR. WEBER: I have a motion to strike, Your Honor. The legal standard for receiving stolen property is actual knowledge. It's not constructive knowledge. What Mr. Jones

* * *

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which is entirely consistent with Mr. Jones either owning the motorcycle two or three years ago with this tag on it or Mr. Jones riding a motorcycle that belonged to somebody else with that tag on it in Waynesboro where everybody seems to agree a lot of racing goes on

and a lot of people ride around on motorcycles, so they're consistent with both. In the light most favorable to the Commonwealth, I would ask the Court to deny the motion to strike.

MR. WEBER: Your Honor, as I pointed out, he's talked about lie after lie after lie and tried to point out on cross-examination that this has to be placed into context. He's being charged with possibly receiving a stolen motor vehicle that he knew was false and it turned out to be false. He's now being charged with eluding and even Officer Rhodes said that he was pushing him on the eluding issue and so, yeah, Mr. Collins was a little bit defensive about that but, you know, he's not obligated to incriminate himself on matters regarding an eluding that he knows nothing about, so while taken independently, and if this was the only evidence the Court had, that if there was an investigation of a stolen vehicle and he's coming in and lying about possession of a stolen vehicle, that's competent evidence, circumstantial evidence to perhaps conclude that he's got a guilty mind, but the investigation had nothing to do with a stolen vehicle and, therefore, any inference about denials of the

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vehicle has nothing to do with his knowledge of it being stolen. It has to do with his knowledge of whether he was eluding or not, and even Officer Rhodes testified that that's exactly what he was doing. The idea that it's Mr. Collins that changed the tag is---there is no evidence to suggest that. It's true that it had a tag on it, but Mr. Collins ultimately admitted that he drove the bike from his mother's house to Jarman's to get new tires on it, you know, and over to Dellmead, but---

we'll concede all that's illegal but it is not evidence that he knew the bike was stolen. He's putting the tag on it that's associated with him. When the eluding charge occurred, it's got a tag on it that's never been associated with Mr. Collins. It's associated only with Eric Jones. No one else---no other person's name has ever been raised in association with the tag that occurred on July 25th, so our argument is that the direct evidence is incomplete because even Eric Jones said, I didn't know it was stolen, you know, I may have assumed that it was because it had no title, but I didn't know that and that's what I conveyed to Mr. Collins. It may have been stolen, but I don't know. It's just because it didn't have a title, but he also said a lot of racing bikes have had no title. They are just not street-worthy bikes and they have no title so it's not unusual. It's not even illegal to have a bike with no title. I asked him about grudge bikes.

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Grudge bikes are just those kind of bikes that have no title that are used solely for racing. So, the direct evidence from Jones is insufficient, couple it with the circumstantial evidence, you have to take that into context with what Mr.---of what Officer Rhodes was investigating, and what's on his mind at the time? You know, as I pointed out from Officer McCall, it's been a rough day for him. This is the third time around receiving a stolen motor vehicle, eluding, and now he's charged with receiving a stolen motorcycle and he didn't know it until he got arrested.

THE COURT: But in the light most favorable to the Commonwealth, if he didn't know it until he got arrested, why didn't he tell them, I recognize the

address, oh, the bike is there, as opposed to telling them he didn't know anything or he didn't know anything about that bike and he hadn't ridden a motorcycle?

MR. WEBER: Your Honor, he's being pushed under an eluding charge. That's the issue. He's, clearly, he's obfuscating his knowledge of the bike, but it's not because it was stolen. It's because he was trying to---

THE COURT: Oh, I see. What you're saying is he is not lying about the bike. The lie that he's telling is in order to avoid an eluding charge,---

MR. WEBER: Right.

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THE COURT: ---not because he thinks he's being investigated about the bike.

MR. WEBER: Right.

THE COURT: I see. So, I'm going to overrule the motion to strike because it is in the light most favorable to the Commonwealth, so I find in the light most favorable to the Commonwealth, but regardless of why he is lying, he is lying, and he is lying as to the bike and the fact that he knew about the bike, that he knows about the residence, and, therefore, the Court's going to overrule the motion to strike.

MR. WEBER: Okay.

THE COURT: So, defense evidence?

MR. WEBER: Yes, we'll call Kandace Beach.

THE COURT: Kandace Beach? I believe she's outside.

THE BAILIFFF: What's that?

THE COURT: Kandace Beach? Can you call for Kandace Beach?

THE BAILIFF: Okay.

THE COURT: If you will come forward and remain standing at the witness box and raise your right hand.

THE CLERK: (Witness sworn) You may be seated.

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K. Beach - Direct

KANDACE BEACH, having been so duly sworn, testified as follows:

DIRECT EXAMINATION

By: Mr. Weber

Q You are Kandace Beach?

A Yes.

Q Can you spell your name for the court reporter?

A It's K-a-n-d-a-c-e and my last name is Beach, B-e-a-c-h.

Q Thank you, and where do you live, Ms. Beach?

A At 2304 Dellmead Lane.

Q Okay, and were you living there on September 10th---

A Yes.

Q ---of last year?

A Uh-huh (indicating yes).

Q And you know the defendant, Ryan Collins?

A Yes.

Q Were you at that time in a romantic relationship with him?

A Yes.

Q Okay. Is he the father of your child?

A Uh-huh (indicating yes).

[p.104]

Q Okay, and on September 10th, had he spent the night with you the night prior?

A Uh-huh (indicating yes).

THE COURT: I'm sorry, you're going to have to answer yes or no.

A Oh, yes, yes, I'm sorry.

Q Okay. Do you recall when you---where were you living before you moved to Dellmead?

A I lived at my mom's house, but I was back and forth between my mom's and Ryan's.

Q And Ryan's house.

A Uh-huh (indicating yes), yeah.

Q Now, his house is on Northfields Circle, is that right?

A Yes.

Q And did you spend nights there?

A Uh-huh (indicating yes).

Q Did you spend a lot of time there?

A Uh-huh (indicating yes).

THE COURT: You have to answer yes or no.

A Oh, I'm sorry, yes.

Q Okay, just answer the questions---

A Okay.

Q ---and speak up. Okay. When did you move to Dellmead?

[p.105]

A It was August 8th was our move-in day.

Q All right, and prior to that, you were living sometimes at your mom's---

A Uh-huh (indicating yes).

Q ---and sometimes at his mom's, but you were over at his mom's house with him a good bit of the time.

A Yeah, uh-huh (indicating yes).

Q Do you recall---let me---can I have that photograph of the motorcycle?

THE COURT: Do you want the---

Q No, this one here. I'm going to show you what is marked as Commonwealth's Exhibit #1 and ask you if you have ever seen that motorcycle before?

A Yes.

Q And where is that motorcycle? Where was that picture taken?

A It's at---at my house on Dellmead.

Q Okay, okay, and when was the first time that you saw that vehicle?

A It was after I moved in Dellmead.

Q After you moved into Dellmead,---

A Uh-huh (indicating yes).

Q ---so you never saw the vehicle at his house at Northfield Circle?

A No.

[p.106]

Q You said you moved in on August the 8th.

A Yes.

Q When was that vehicle brought over to---

A It was probably a week after because Ryan never---we moved in for a good week, and he wasn't there that week so it had to be a week after I moved in, if so.

Q Okay, you remember the day he got arrested, September 10th?

A Yes, uh-huh (indicating yes).

Q Go from that date and go backwards and tell me how long that bike had been there.

A Not long, maybe a week.

Q Maybe a week---

A Yeah, at the most.

Q ---backwards from ---

A Yeah.

Q --- from September 10th, okay. If the motorcycle were parked at his mom's house in plain view, would you have been able to see it?

A Sure, yeah, uh-huh (indicating yes).

Q But you never saw it there?

A No, not that one, no.

Q Thank you. No further questions.

[p.107]

K. Beach - Cross

CROSS-EXAMINATION

By: Mr. Casey

Q So, you moved into the house on Dellmead on August the 8th, is that correct?

A Uh-huh (indicating yes).

Q And he didn't move in for about a week? He wasn't there at the house or---

A He never actually moved in. He just stayed.

Q He just stayed.

A Yeah.

Q So, during the time that you were living there, he was also staying at---

A Just at his mom's, yeah.

Q His mom's as far as you knew.

A Uh-huh (indicating yes). Well, yeah.

Q So, you were staying there so you assumed he was staying there.

A Well, yeah, I assumed, yeah.

Q You don't know.

A Yeah.

Q Do you know someone named Chevel Harvey?

A I know of Chevel. I don't really know Chevel like that.

Q Okay. Do you know if Mr. Collins used to---did he know Mr. Harvey?

[p.108]

A Uh-huh (indicating yes).

Q And Mr. Harvey has a residence in---around---his own residence, his own place, as far as you know, right?

A I have no idea. I don't know.

Q You never spent any time with Mr. Collins and Mr. Harvey together?

A No, uh-uh (indicating no).

Q Okay. Those are the questions I have, Judge.

MR. WEBER: Nothing further, Your Honor.

THE COURT: You may step down.

A Thank you.

THE COURT: If you would please remain outside the double doors.

A All right. Thank you.

MR. WEBER: I call Terry Roberts.

THE COURT: Terry Roberts.

MR. WEBER: If I could have that photograph back. It would be easier for her, too.

THE COURT: Yes, you're welcome to hold onto it.

MR. WEBER: (Inaudible)

THE COURT: Oh, I'm sorry.

THE CLERK: (Witness sworn) You may be seated.

THE COURT: Ms. Roberts, if you'll be sure to keep your voice up, please.

MS. ROBERTS: Yes, ma'am.

[p.109]

THE COURT: Thank you.

TERRI ROBERTS, having been so duly sworn, testified as follows:

DIRECT EXAMINATION

By: Mr. Weber

Q Tell your name, please.

A I'm Terri Lynn Roberts.

Q Could you spell your first and last name for the court reporter?

A T-e-r-r-i, R-o-b-e-r-t-s.

Q And what is your relationship to Ryan Collins?

A I'm his mother.

Q And where do you live?

A I live at 103 Northfields Circle, Charlottesville.

Q Albemarle County?

A It's in Albemarle County.

Q How far is that from the Dellmead address? Do you know?

A Two or three---about three or four miles.

Q Okay.

[p.110]

A I'm assuming.

Q Let me go back to June the 4th of last year. Where was Mr. Collins living at the time?

A At 103 Northfields, at my residence.

Q Okay, and was he under any kind of legal restraint at that point?

A He was home incarcerated.

Q And how long had he been on home incarceration?

A Almost ten months.

Q This was actually a pre-trial incarceration, is that right?

A It was a pre-trial, that's correct.

Q So, how long had it been?

A At least---he was---

Q Almost a year?

A Almost a year he was on house arrest.

Q Okay, and on June the 4th, was he required to be in court?

A Yes.

Q Where?

A Here, the city, I'm sorry, Charlottesville.

Q Charlottesville Circuit Court.

A That's correct.

Q Okay, and he had a trial scheduled that day?

A Yeah, but it was continued.

[p.111]

Q Okay, and did the judge on that day relieve him of his obligation to be on home incarceration?

A Yes.

Q What agency was doing the home electronic monitoring?

A Blue Ridge Services.

Q That's over in Staunton?

A Yeah.

Q And were you required to take him over there to get him off?

A Yes.

Q And did you get him off on June the 4th, or did you wait another day?

A It was the next day, the following day.

Q June the 5th.

A Yes.

Q So, June the 4th he was still on home electronic incarceration.

A Yeah, he was on---yes, he was.

Q Okay, and for almost a year prior to that he was on home electronic incarceration, is that right?

A Yes, the whole year. I paid for it, so yes.

Q He was not allowed to leave the house without permission from Blue Ridge Services, is that right?

A That's right.

[p.112]

Q And you paid a lot of money to keep him on that.

A I sure did.

Q All right. Now, I'm going to show you what's been marked as Commonwealth's Exhibit #1. Have you ever seen that motorcycle before?

A Maybe once, twice.

Q Was it ever parked at your house at Northfields?

A Yes.

Q Okay. Where was it parked?

A At the end of my driveway. We live in a cul-de-sac so when you come around the cul-de-sac, my driveway is paved and it goes down and there's a fence, so he parked his bike at the end of the driveway---

Q Okay.

A ---which is visible.

Q How long was that bike parked at your house?

A At least a month.

Q A month, and was it in plain view?

A Yes.

Q During that month, did any police officer ever come to your door?

A No.

[p.113]

Q Could a police officer have come to your door and you not be there and you wouldn't know about it?

A Yeah, I would know about it. I have another son that lives at home. He's twenty-one (21) and he's always there. There's not a time when he's not there.

Q So, if somebody knocked on the door, he would answer it?

A Yeah, he would answer it.

Q Okay, and that motorcycle would have been there---

A Yeah.

Q ---in plain view?

A Yeah, yeah. It's either parked at the end of the driveway or on the cul-de-sac in front of our yard. I mean, it's just, you know, you can't miss it.

Q You never saw any notes on the door---

A No notes.

Q ---to call an officer or anything like that?

A No.

Q On September 10th, you recall that he got arrested.

A Uh-huh (indicating yes).

Q Did you actually go down to the magistrate's office or---

A Well,---

[p.114]

Q ---or to the jail or someplace when he got arrested?

A Yeah, I tried to see if I could get him out on bond, but because he couldn't get out on bond.

THE COURT: Because why?

A Because he was already---because of the trouble he was already in prior to the motorcycle charges.

Q Okay, so did you encounter Officer Rhodes?

A Well, I encountered Officer Rhodes the following day because he had the car keys that Ryan---to the car that Ryan had---went to DMV to---

Q Did you have a conversation with Officer Rhodes?

A Yes.

Q What did he say?

MR. CASEY: Objection to that unless it's---

Q (Unintelligible), Your Honor. It's not offered for its truth. It's offered to show bias.

THE COURT: Well, how is it bias if it's not true?

Q It just goes to what he said, not the content of the---if he says something, you know, the content of it doesn't have to be true. If he said it, it can be inferred and he's got a bias, whether it's true or not.

[p.115]

T. Roberts - Cross

THE COURT: I disagree. I would find it would have to be true in order for the Court to find there was a bias, so the Court's going to sustain the hearsay objection.

Q Nothing further, Your Honor.

THE COURT: Cross-examination, Mr. Casey?

CROSS-EXAMINATION

By: Mr. Casey

Q So, the motorcycle when it was in front of your house at Northfields, you couldn't miss it. It was very obvious. You could see it.

A That's correct.

Q And it had been there for at least a month you said, correct?

A Yeah.

THE COURT: And, I'm sorry, a month as of---

A Which month? As in, like, thirty (30) days, from the end of, like, the whole month of August it sat in my driveway, at the end of the driveway, almost the entire

month of August because the tires were bad on it, and I actually was saying something to Ryan about the bike sitting there because it was just sitting there. I wanted him to remove it.

Q And what did he say?

* * *

[p.139]

Court that she saw at Northfields the motorcycle wasn't there. Of course, the defendant's mother, Ms. Roberts, who is working a lot believes it to be there all the time, but she really doesn't know because Ms. Beach tells the Court it was gone. Where was it? Well, it couldn't be with the defendant because Ms. Beach knew the defendant, so it had to be stored somewhere else. The transaction between the defendant and Mr. Jones makes sense because it's stolen property because the defendant knows it's stolen property. We ask that you find in this case that his willful blindness is not a defense, and we ask that you find him guilty.

THE COURT: So, if I can just have a moment, I want to review my notes. (Pause) So, here is the observation of the Court. The Court is going to begin its analysis with the defendant's version of what occurred because if I find those facts to be credible, then there would be doubt as to whether or not the defendant is guilty. As I understand the defense position, Eric Jones actually or likely is the one who committed the eluding charges, and that while the defendant may have bought the bike from Mr. Jones, he bought it in August with no knowledge that the bike was stolen, so assuming this to be true, the Court finds the defendant---would find then that the defendant did buy the bike from Eric

Jones with no title. Clearly from the testimony of Mr. Jones the bike not having a title was a serious

[p.140]

red flag to him because I believe it was in cross-examination that he mentioned that the very first conversation that he has with Mr. Collins about the bike, he lets him know there is no title because he thinks that the bike is stolen, and it did seem consistent with the rest of his testimony that he did think the bike was stolen. He kept using the phrase interchangeable (sic), I told him it was stolen, and he said I didn't know for sure that it was stolen, so the Court takes he may have implied he knew it was stolen or he may have said, I'm pretty sure that I know that it's stolen. So, then the Court looks at the testimony of the defendant when he is confronted by the officers, and there did appear to be some confusion by Officer Rhodes as to what he remembered, but as was true of defense witnesses, these events happened a while ago. However, the Court would note that Officer McCall's testimony was almost identical to Officer Rhodes' testimony. Officer McCall testified that he responded to the DMV, and after giving the defendant Miranda, he asked him about the motorcycle, and he said the defendant said that he had not owned a motorcycle in a month, that he had not driven any motorcycles, that the last motorcycle in months, the last motorcycle he owned was green and that that was all that he knew. So, if the Court takes that to be true, then the Court looks at the actions of the defendant from those particular statements, and the testimony

[p.141]

of Ms. Beach was that she had not seen that vehicle before August the 8th, but clearly she had been to the mother's residence. The mother's testimony, I want to make sure that was August the 8th. Ms. Beach said, excuse me, I correct myself. She said she moved to the Dellmead address on August the 8th and he brought it to her home a week later, so somewhere around August the 15th. Ms. Roberts said that the bike had been at her residence for almost, excuse me, her testimony was the bike was parked at her house for at least a month in plain view, which if the Court finds Ms. Beach's testimony to be credible, and it seems like an August the 8th move-in date would certainly be something that would be rememberable (sic), and if the bike is moved there approximately a week later, we're talking about August the 15th, August the 20th maybe, and if Ms. Roberts is correct, and the Court believes her and the house---that the bike had been at her house for a month, that would have made it sometime in the middle of July.

MR. WEBER: Your Honor, I just need to correct one thing.

THE COURT: Yes.

MR. WEBER: The Court said that Ms. Beach testified that it came to Dellmead a week later. I clarified that on cross-examination and I said, remember the date that he got arrested September 10th, and she said, yes, and I

[p.142]

said, what date prior to that did that bike come there? She said, about a week or a few days more than a week,---

THE COURT: Yes.

MR. WEBER: ---so it was early September when she clarified that it came to Dellmead, not a week after August the 8th.

THE COURT: Thank you.

MR. WEBER: I just want to make sure that the Court is not mis-analyzing what she said. I made that very clear on using September 10th as the date. She backed it up and said about a week, and that's consistent with what she said here at the hearing last week. It's also consistent with the date on the Jarman's---the sheet that was brought in a week ago.

THE COURT: Thank you.

MR. WEBER: Okay.

THE COURT: So, then Ms. Roberts' testimony would be correct that the bike had been at her house, obvious and open, for at least a week, but Ms. Beach never saw it at the Northfields address. The first time she sees it is in September when it's moved to her residence. So, then the Court finds that---if the Court finds that testimony to be credible, that would mean that the defendant wasn't responsible for the eluding charge. If he wasn't responsible for the eluding charge, why would he then lie to the officers to

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the extent that, I didn't have a bike, I haven't had a bike for a month, the last bike I owned was green, and I don't know anything about the Dellmead residence. Why not simply tell the officers, I own that bike, but I got it from Eric Roberts (sic) and, in fact, later on, I believe it was the testimony of Officer Rhodes, when he's speaking to the defendant at the house, the defendant does tell him other statements. He said, I bought the bike, first of all, after saying that he had bought the bike, that he didn't know anything about the bike, then he says that he bought it from a friend and then he says that he buys it from Eric Rhodes (sic), excuse me, Eric Jones, but this explanation about the fact that---oh, the explanation about the fact that, well, I said that I didn't know anything about the bike because I was concerned I would be charged with the eluding never comes up. Never when he's talking to the officer does he say, you-all were questioning me about the eluding charge, and I thought I'd be found guilty of the eluding and I didn't want to be implicated. None of that testimony appears until he's in court today, and it does seem questionable, at the least to the Court, to find that something so significant would not be brought up by the defendant after he is confronted with the fact that the bike is in the residence of---a residence that he is familiar with and it's not green, and he has been driving it and he's even gone to

[p.144]

the extent of putting a tag on it. And, clearly, the defendant had been with the police officers that day then there had been a question about another vehicle that was thought to be stolen and it was cleared up

that it wasn't stolen, so it would seem to the Court it would only make sense that his statement or his honesty with regards to the car not being stolen would certainly have also been reflected in a bike that he possessed but wasn't driving on for the date of the eluding, so I just find the defendant's explanation of what occurred to be incredible. I think there is a question about having the bike for eighteen hundred dollars ($1,800) or a thousand dollars ($1,000) less than you bought it. The Court would note that Mr. Jones, with all due respect, did not seem as if he would necessarily be financially savvy, and he indicated that he needed the money, and to someone that needs the money, eighteen hundred dollars ($1,800) is a lot of money, so the Court did not find that to be something that would be significant, and, therefore, I find the Commonwealth has met their burden and find the defendant guilty as set forth in the indictment. And, Mr. Weber, your exception to the Court's ruling is noted. So, I believe we need to arraign the defendant on the other charge, correct?

MR. CASEY: Yes, Your Honor.

* * *

COMMONWEALTH EXHIBIT 1
Admitted 5-7-14

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF ALBEMARLE ON THE CRIMINAL SIDE THEREOF, HELD ON **APRIL 30, 2014.**

PRESENT: HON. **CHERYL V. HIGGINS**

No. 13-672, 13-673

[Filed May 20, 2014]

COMMONWEALTH OF VIRGINIA)
)
vs.)
)
RYAN AUSIN COLLINS)
)

SSN [redacted]**-5118** Sex: male
DOB: [redacted]**/1989** Race: white
STATUS: bail

Case Number	Offense	VCC Code	F/M	Offense Date	Virginia Code Section
13-672	Buy/Receive Stolen Property	LAR-2808-F9	F	09/10/2013	18.2-108
13-673	Alter/forge Certificate Title or Registration	REG-6737-F6	F	09/10/2013	46.2-605

Attorney for the Commonwealth: Elliott Casey

Attorney for the Defendant: Charles Weber

The defendant was present with his attorney.

On motion of the Attorney for the Commonwealth and for reasons stated on the record, it is hereby Ordered that the motion to suppress is denied.

ENTER: /s/Cheryl V. Higgins
JUDGE

DATE: 5-20-14

VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF ALBEMARLE ON THE CRIMINAL SIDE THEREOF, HELD ON **MAY 7, 2014.**

PRESENT: HON. **CHERYL V. HIGGINS**

No. 13-672

[Filed May 20, 2014]

COMMONWEALTH OF VIRGINIA)
)
vs.)
)
RYAN AUSIN COLLINS)
)

SSN [redacted]-5118 Sex: male
DOB: [redacted]/1989 Race: white
STATUS: bail

Case Number	Offense	VCC Code	F/M	Offense Date	Virginia Code Section
13-672	Buy/Receive Stolen Property	LAR-2808-F9	F	09/10/2013	18.2-108

Attorney for the Commonwealth: Elliott Casey

Attorney for the Defendant: Charles Weber

The defendant was present with his attorney.

Whereupon the accused, after private consultation with counsel, and being advised by his

counsel, pleaded not guilty to the indictment, which plea were tendered by the accused in person, and after being advised of his right to trial by jury, the accused in person, knowingly and voluntarily waived trial by jury, and with the concurrence of the Attorney for the Commonwealth and the Court, here entered of record, the Court proceeded to hear and determine the case without the intervention of a jury as provided by law and having heard the evidence and argument of counsel finds the accused guilty as charged in the indictment.

The Attorney for the Commonwealth and the defendant were given the opportunity to present evidence pertaining to sentencing.

Pursuant to the provisions of Virginia Code Section 19.2-298.01, the Court has considered the applicable discretionary sentencing guidelines and the guidelines worksheets.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reasons why judgment should not be pronounced.

The Court SENTENCED the defendant to incarceration with the Virginia Department of Corrections for the term of ***three years.*** The Court SUSPENDED ***all but two months*** of the sentence.

SENTENCING SUMMARY:

TOTAL SENTENCE IMPOSED: ***three years***

TOTAL SENTENCE SUSPENDED: ***all but two months (The Court finds that the defendant has previously served the two months sentence)***

The suspended portion of the defendant's sentence was suspended on the following conditions:

GOOD BEHAVIOR. The defendant shall be of good behavior and not violate any penal laws of this Commonwealth or any of its political subdivisions for the term of three years.

NO CONTACT. The defendant shall have no contact whatsoever with the person or property of Eric Jones.

COURT COSTS. The defendant shall pay Court costs.

This sentence shall run ***consecutively*** to any other sentences imposed.

The Court certifies that at all times during the trial of this case the defendant was personally present and counsel for the defendant was personally present.

ENTER: /s/Cheryl V. Higgins
JUDGE

DATE: 5-20-14

2015 WL 4977971 (Va.App.)

COURT OF APPEALS OF VIRGINIA

No. 1096-14-2

[Filed January 28, 2015]

RYAN AUSTIN COLLINS,	)
	)
Appellant,	)
	)
v.	)
	)
COMMONWEALTH OF VIRGINIA,	)
	)
Appellee.	)
	)

OPENING BRIEF OF APPELLANT

Charles L. Weber, Jr.
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for appellant

* * *

[*Tables Omitted in the Printing of this Appendix*]

ASSIGNMENTS OF ERROR

1. The trial court erred in denying Collins' motion to suppress the evidence related to the motorcycle because the officer illegally trespassed onto private property for purpose of conducting a search in violation of his Fourth Amendment right to be free of unreasonable searches and seizures. (J.A. 118-121)

2. The trial court erred in denying Collins' motion to strike the evidence and finding him guilty because the evidence was insufficient as a matter of law to prove that he had actual knowledge that the motorcycle was stolen. (J.A. 215-224, 261-266)

NATURE OF THE CASE AND MATERIAL PROCEEDINGS IN THE TRIAL COURT

On September 10, 2014, the defendant-appellant, Ryan Austin Collins, was arrested and charged on a warrant with receiving stolen goods having a value of $200.00 or more in violation of Virginia Code § 18.2-108.

On October 17, 2013, the General District Court for Albemarle County found probable cause that Collins had committed the offense and certified the matter to the grand jury.

On December 2, 2013, the grand jury for Albemarle County returned an indictment for the felony offense of receiving stolen goods as charged on the warrant.

On December 18, 2013, Collins filed a motion to suppress all evidence in the case on the grounds that the search and seizure of the evidence was in violation

of his Fourth Amendment rights to be free of unreasonable searches and seizures.

On April 30, 2014, the Circuit Court of Albemarle County, upon evidence and argument of counsel, denied his motion to suppress.

On May 7, 2014, Collins was tried by a judge sitting without a jury and was found guilty as charged in the indictment. Final judgment was entered May 20, 2014.

Mr. Collins filed a timely notice of appeal.

On December 19, 2014, the Court of Appeals granted this appeal.

STATEMENT OF FACTS

On September 10, 2013, Collins was temporarily detained at the Department of Motor Vehicles (DMV) in Albemarle County for attempting to register a motor vehicle (automobile) which had been reported stolen (J.A. 172-172, 188). It was later discovered that the vehicle had not, in fact, been stolen and this matter is unrelated to the present charge (J.A. 188).

However, during his detention at DMV, Officers Rhodes and McCall of the Albemarle County Police Department, having heard Collins name mentioned on the police radio, proceeded to DMV for the purpose of questioning him about two suspected, but unrelated, instances of eluding while operating a motorcycle (J.A. 162, 173-175). The dates of these incidents were June 4, 2013 involving Officer McCall and July 25, 2013 involving Officer Rhodes respectively (J.A. 85-86, 165-166, 189-190).

During the July eluding incident, Officer Rhodes had recorded the licence plate number on the eluding motorcycle (J.A. 174). DMV records indicated that the license plate was inactive (J.A. 174). Officer Rhodes then checked a local police database (known as PISTOL) and the license plate had been associated with an earlier incident involving Eric Jones (J.A. 174).

At the pre-trial hearing, Officer Rhodes testified that he had spoken to Jones several times but he could not recall the dates (J.A. 93). He stated that spoke to Jones after July 25, 2013 (the date of the eluding incident) and both before and after September 10, 2013 (the date of Collins' arrest) (J.A. 93). Jones told Officer Rhodes that he had sold the motorcycle; however, Officer Rhodes stated Jones had been difficult to contact and that he had received information linking Collins to the motorcycle from a source other than Jones (J.A. 93-94).

Officer Rhodes had recorded the eluding incident on a video device installed in his police vehicle and subsequently took a still shot of one frame of the video (J.A.190, 129).

While still at DMV, Collins was shown the aforementioned still shot which was a photograph of a person on a motorcycle allegedly speeding away from a police vehicle (J.A. 190, 129). Collins denied all knowledge of this or any other eluding incident (J.A. 190-192).

While Officer McCall spoke to Collins, Officer Rhodes went to a police vehicle and took some photographs of Collins Facebook page with his phone (J.A. 175). Another unidentified police officer had

access to his Facebook page and permitted Officer Rhodes to photograph it (J.A. 88). One photograph showed a motorcycle, similar to the one Officer Rhodes had encountered, parked at residence in the City of Charlottesville (J.A. 125). A second photograph showed that same residence with a picture of a silver Accura similar to the one Collins was attempting to register at DMV (J.A. 124). Officer Rhodes then showed the photographs of the Facebook page to Collins who, according to Officer Rhodes, denied all knowledge of the motorcycle (J.A. 175).

Officer Rhodes, through other sources, had developed information that a motorcycle similar to the one used to elude the police might be located at an address on Dellmead Lane in the City of Charlottesville (J.A. 178). Upon arrival at that address, Officer Rhodes saw a motorcycle parked in a private driveway and covered with a tarp (J.A. 178-179). The outline of the motorcycle was similar to the one he had seen on July 25, 2013 and he suspected that it might be the same one (J.A. 179).

Without the consent of anyone residing at the property, Officer Rhodes proceeded onto private property, removed the tarp, examined the motorcycle and recorded both the license plate number and the Vehicle Identification Number (VIN) (J.A. 90-91, 101, 179). The licence plate was not the same one that was on the motorcycle during the eluding incident (J.A. 180). However, DMV records revealed that the licence plate was associated with the different motorcycle and that the VIN was associated with a motorcycle that had been reported stolen out of New York several years prior to this date (J.A. 180-181, 186).

Officer Rhodes set up surveillance of the residence while he developed further evidence (J.A. 182). Later he proceeded to the front door to talk to the resident(s) (J.A. 182). Collins answered the door (J.A. 214).

Collins initially denied knowledge of the motorcycle but later admitted that he had purchased the motorcycle from Eric Jones and that he had recently driven it from his mother's house to Jarman's Sportscycles to get new tires and then to Dellmead Lane (J.A. 183-184). Officer Rhodes then placed Collins under arrest for receiving stolen property (J.A. 185, 197). Officer Rhodes stated that he did not inform Collins that the motorcycle was reported stolen until after he placed him under arrest (J.A. 197).

At a pre-trial hearing, Officer Rhodes justified his trespass onto private property by saying that (a) he needed to verify that this motorcycle was in fact the same one he had encountered during the eluding incident of July 25, 2013; (b) a motorcycle is movable; (c) he needed to verify the owner of the vehicle and whether the owner lived at that address; (d) he needed to verify whether the motorcycle was properly registered; (e) he needed to verify whether the motorcycle was properly insured; (f) he needed to verify whether the operator of the motorcycle was properly licensed to do so (J.A. 97-98). He admitted, however, that the motorcycle itself is not contraband (J.A. 98).

He also admitted that, even after examining the motorcycle and determining all of the foregoing facts related to the motorcycle, he still had no probable cause to charge Collins with eluding (J.A. 98).

Officer McCall testified at trial that he, too, responded to DMV to speak with Collins (J.A. 161-162). He admitted that he did not know Collins before that day but recognized his name on the police radio (J.A. 161). Initially he spoke to Collins about the automobile that he was trying to register at DMV but eventually began to talk to him about an eluding incident on Emmett St that involved a motorcycle (J.A. 163). He told Collins that he thought he was the driver of the motorcycle (J.A. 163). Collins responded by saying that he had not owned a motorcycle in months, had not driven one in months and that he was not the driver (J.A. 163). Collins stated that the last motorcycle he had owned was green (J.A. 164). Officer McCall stated that he was present when a motorcycle was located on Dellmead Avenue but had no interaction with Collins at that time (J.A. 164).

Officer McCall could not recall the exact date of the eluding incident but admitted speaking about it with Officer Rhodes and further admitted that the date could have been June 4, 2014 (J.A. 165-166). He said the motorcycle that eluded him was similar to the one described by Officer Rhodes but he could not be sure if it was the same one (J.A. 170). He also stated that the person who had eluded him was dark-skinned (J.A. 170-171.

Officer McCall may have transported Collins after his arrest and knew that he was in the back seat of his patrol car at some point (J.A. 168). He admitted that Collins had originally been accused of receiving a stolen automobile and that had later been interrogated and accused of eluding and that he finally was arrested by Officer Rhodes for receiving a stolen motorcycle (J.A.

168-179). He stated that Collins never admitted knowing that the motorcycle was stolen and that if he had, he would have made a note of it (J.A. 169). He acknowledged that it had been a rough day for Collins having been accused of three crimes (J.A. 168-170).

Eric Jones testified that he bought the motorcycle some time in March or April of 2013 (J.A. 139-140). He received it without a title and thought that it had possibly been stolen (J.A. 140). On cross examination, he admitted that he was never told it was stolen when he bought it but that he just assumed as much because it did not have a title (J.A. 146). He had paid $2800 for the bike and sold it to Collins for $1800 (J.A. 141, 144-145). He claimed that he sold it some time around the end of April 2013 (J.A, 143). The motorcycle had a key when he bought it and when he sold it (J.A. 142).

When he sold the bike to Collins, he told him that he thought it might have been stolen because it had no title but he never told him that he knew the bike had been stolen (J.A. 141, 153-154).

Jones had owned the motorcycle for about a month and half during which time he regularly towed it a raceway in Waynesboro for the purpose of racing it on a race track (J.A. 141, 143, 145-146). He said that he races many bikes every year and knew that racing bikes do not always have titles (J.A. 146-147). He knew that the term "grudge bike" means one that is used for racing only and not legal to put on the street (J.A. 147). A grudge bike could be one that has incurred frame damage (J.A. 148). Yet he testified that Collins wanted to put a new frame on it for the purpose of turning in into a racing bike (J.A. 142).

Jones admitted that he had previously been convicted of a crime involving lying, cheating or stealing (J.A. 148).

Jones testified that he had contacted Collins, not vice versa, to advise him that he wanted to sell the bike and to see if Collins was interested in purchasing it (J.A. 149). He stated that Collins came to his place of employment at FBR Towing on Harris Street in Charlottesville at around lunch time in April to view the bike and negotiate a possible sale (J.A. 150). At that time, Jones was cleaning the bike after the race track ready it for sale (J.A. 151). He testified that there was license tag on the bike which was on the bike when he bought it a month or two previously (J.A. 151-152). No agreement was reached at that time but he later delivered the bike to Collins' residence (J.A. 152-153).

Kandace Beach testified that she moved into the Dellmead residence on August 8, 2013, that Collins was an occasional overnight guest and that he had stayed there the night prior to his arrest on September 10, 2013 (J.A. 225-227). At that time, she was in a romantic relationship with Collins and had given birth to Collins' child (J.A. 225). Before August 8, she lived with her mother but frequently visited Collins at his residence on Northfields Circle (J.A. 226-227). She testified that the first time she had seen the motorcycle was when Collins brought it to her Dellmead residence about a week before his arrest (J.A. 227-228). Prior to August 8, she had not previously seen the motorcycle at his Northfields Circle address (J.A. 227-228).

Terri Roberts, Collins' mother, resides at [redacted] in Albemarle County (J.A. 231). On June 4, 2013, Collins appeared in the Circuit Court of

Charlottesville for a trial which was ultimately continued (J.A. 232). On that date and for about ten (10) months preceding that date, Collins had been on pre-trial home electronic incarceration (HEI) monitored by Blue Ridge Services in Staunton (J.A. 232-233). On June 4, 2013, the circuit court relieved him of his obligation to remain on pre-trial HEI but he was not actually taken off until the following day (J.A. 233).

Roberts recognized the motorcycle and said that it was parked in plain view at the end of her driveway for most of the month of August (J.A. 234-235, 237). She wanted the bike moved but it just sat there because the tires were bad (J.A. 237-238). She said one day he apparently replaced the tires and moved the bike (J.A. 237-238). She also testified that during that month, no police officer came to her residence to speak to Collins or inquire about the motorcycle (J.A. 234-235).

ARGUMENT

I THE TRIAL COURT ERRED IN DENYING COLLINS' MOTION TO SUPPRESS THE EVIDENCE RELATED TO THE MOTORCYCLE BECAUSE THE OFFICER ILLEGALLY TRESPASSED ONTO PRIVATE PROPERTY FOR PURPOSE OF CONDUCTING A SEARCH IN VIOLATION OF HIS FOURTH AMENDMENT RIGHT TO BE FREE OF UNREASONABLE SEARCHES AND SEIZURES

a. Standard of review

On appeal, the circuit courts factual findings in denying a motion to suppress are reviewed for clear error, but the circuit court's application of the law is

subject to de novo review. *Commonwealth v. Quarles,* 283 Va. 214, 720 S.E.2d 84 (2012).

b. *Officer Rhodes illegally trespassed onto private property for the purpose of conducting a search for evidence*

The government's physical intrusion onto an effect for the purpose of obtaining information constitutes a search within the meaning of the Fourth Amendment. *United States v. Jones,* 565 U.S. ___ 101259 (2012). Fourth Amendment jurisprudence applies not only to a reasonable expectation of privacy but also to common law trespass. Id. A police officer may not enter the curtilage of a home simply to conduct a search without a warrant. *Florida v. Jardines,* 569 U.S. ___ 11564 (2013).

In Jones, the U. S. Supreme Court held that the Government's attachment of a GPS device to a vehicle and the use of that device to monitor the vehicle's movements constituted a search under the Fourth Amendment and upheld the suppression of all evidence obtained by the warrantless use of a GPS device. *Jones* at Slip. Op. 1,12. In that case, the vehicle was parked at the defendant's residence at the time the device was attached. Id. The motor vehicle is an effect protected by the Fourth Amendment. Id.

In *Jardines,* the U. S. Supreme Court held that when the government obtains information by physically intruding on the curtilage of a house, a search within the meaning of the Fourth Amendment has undoubtedly occurred. *Jardines* at Slip. Op. 1. In that case, the police had received an unverified tip that marijuana was being grown at Jardines' home. Id.

After a brief period of surveillance, the police entered the curtilage of the home with a drug detecting dog which gave a positive alert for narcotics at the base of the front door. Id. At Slip. Op. 2. The Court upheld the suppression of all evidence holding that the officers had engaged in a Fourth Amendment search unsupported by probable cause. Id. at Slip. Op. 1, 10.

In this case, several facts are uncontested; namely, (1) Officer Rhodes entered into the curtilage of a home without a warrant and without permission of the residents; (2) he did so for the purpose of conducting a search for a particular motorcycle which was parked in the driveway at the residence; (3) he was investigating the crime of eluding; (4) he had received a tip, the source of which was not disclosed, that Collins may have been the driver that had eluded him on July 25, 2013; (5) he physically removed a tarp which was covering the motorcycle noting its appearance and recording the licence tag number and the Vehicle Identification Number; (6) even after verifying that Collins owned the motorcycle, Officer Rhodes had, and still has, no probable cause to arrest him for the crime of eluding; (7) Collins was an invited overnight guest at the residence and had standing to contest the Fourth Amendment violation.

The trial court opined that *Jardines* was not applicable because it could be distinguished on the facts; specifically, that *Jardines* involved the use a drug detecting dog (J.A. 118-121). The court held that Officer Rhodes had probable cause to conduct the search and thus his intrusion onto Collins' property was not unreasonable (J.A. 121).

The trial court erred. As the U. S. Supreme Court said:

> "...when it comes to the Fourth Amendment, the home is first among equals. At the Amendment's "very core" stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States,* 365 U.S. 505, 511 (1961). This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity... A license may be implied from the habits of the country," notwithstanding the "strict rule of the English common law as to entry upon a close." *McKee v. Gratz,* 260 U.S. 127, 136 (1922) (Holmes, J.). We have accordingly recognized that "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds." *Breard v. Alexandria,* 341 U.S. 622, 626 (1951). This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant may approach

> a home and knock, precisely because that is "no more than any private citizen might do."

Jardines, 569 U.S. at Slip. Op. 4, 6.

Officer Rhodes could see the outline of a motorcycle from the street but was unable to determine from that vantage point if it was the same one involved in the eluding incident. At that time, he had no reason to suspect that the motorcycle was stolen. Moreover, even if it proved to be the same motorcycle he had encountered on July 25, he had no reason to believe that identifying the motorcycle would enable him to identify Collins as the driver on that date.

As the U. S. Supreme Court has said,

> "One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred."

Jardines, 569 U.S. at Slip. Op. 9.

By this standard, this case is easy. Officer Rhodes trespassed onto private property to search for evidence of a crime. Only after physically intruding on Collins' property did he learn that the motorcycle may have been the same one involved in an earlier eluding incident. But Officer Rhodes knew that the identity of the driver, not the identity of the motorcycle, was the principal reason for his investigation. Even after removing the tarp to search for evidence, he still has not learned and could not have learned who was driving the motorcycle at the time. To this day, Officer

Rhodes is without probable cause to charge Collins with eluding.

Moreover, only after physically intruding on Collins' property did he learn that the motorcycle had been reported stolen. Prior to his intrusion, Officer Rhodes had no suspicion, much less probable cause, to suspect that it had been stolen.

Thus, the trial court erred in holding that Officer Rhodes had probable cause to trespass onto private property to search for evidence of a crime.

c. The emergency exception to the warrant requirement does not apply

Warrantless entry and search of a home or its curtilage require not only probable cause but also exigent circumstances. See, *Warden v. Hayden,* 387 U.S. 294 (1962) (hot pursuit of a suspect armed felon); *Minnesota v. Olsen,* 495 U.S. 91 (1990) (imminent risk of destruction of evidence, escape of the suspect, or danger to police or others); *Brigham City v. Stuart,* 547 U.S. 398 (2006) (police reasonably believe an occupant is seriously injured or in imminent danger); *Washington v. Commonwealth,* 60 Va. App. 427, 728 S.E.2d 521 (2012) (exigent circumstances, coupled with a showing of probable cause of house having been broken into, justified warrantless entry into home); *Verez v. Commonwealth,* 230 Va. 405, 410, 337 S.E.2d 749, 752-53 (1985) (warrantless entries are presumed to be unreasonable, in Fourth Amendment terms, casting upon the police a heavy burden of proving justification by exigent circumstances).

Collins argued that Officer Rhodes had neither probable cause nor exigent circumstances. (J.A. 52-54).

The court held that Officer Rhodes had probable cause to conduct the search but did not address exigent circumstances. (J.A. 121). Thus, the trial court erred in holding that the warrantless intrusion onto private property was reasonable.

In this case, no exigent circumstances existed. None were articulated by Officer Rhodes and none were argued by the Commonwealth.

This was not a "hot pursuit" situation because Officer Rhodes was investigating a crime of eluding which had occurred nearly two monthis prior to this date. There was no risk that evidence would be destroyed because the motorcycle was in plain view and Officer Rhodes had already set up surveillance of the residence to prevent anyone from removing the motorcycle without his knowledge. Nothing about the case or in the testimony suggested that there might be any danger to the police or to others.

Officer Rhodes could easily have complied with the law by knocking on the front door for the purpose of talking to and seeking consent from the residents. Instead of complying with the traditional invitation to "knock and talk," Officer Rhodes trespassed onto the property and removed the tarp which covered the motorcycle. This act exceeded the licence generally accepted for entry onto private property.

Alternatively, he could have sent Officer McCall to the magistrate for a search warrant based on a showing of probable cause to an independent judicial officer. He had already sent Officer McCall on another fact-finding errand to Jarman's Sportcycles. Thus,

Officer McCall was not a critical component of the surveillance operation.

Even if some semblance of probable cause existed, there were no exigent circumstances to justify the trespass onto the curtilage of Collins' home.

Thus, Officer Rhodes' warrantless trespass onto private property to search for evidence without probable cause and exigent circumstances was per se unreasonable and a violation of Collins' rights under the Fourth Amendment of the Constitution of the United States.

d. Conclusion

For the foregoing reasons, this court should find that the trial court erred in denying Collins' motion to suppress evidence related to the motorcycle, reverse his conviction and remand the matter back to the circuit court for further proceedings.

II THE TRIAL COURT ERRED IN DENYING COLLINS' MOTION TO STRIKE THE EVIDENCE AND FINDING HIM GUILTY BECAUSE THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO PROVE THAT HE HAD ACTUAL KNOWLEDGE THAT THE MOTORCYCLE WAS STOLEN

a. Standard of review

When examining a challenge to the sufficiency of the evidence, an appellate court must review the evidence in the light most favorable to the prevailing party at trial and consider any reasonable inferences

from the facts proved. *Zimmerman v. Commonwealth*, 266 Va. 384, 386, 585 S.E.2d 538, 539 (2003). The judgment of the trial court is presumed to be correct and will be reversed only upon a showing that it is "plainly wrong or without evidence to support it." Code § 8.01-680; *Jackson v. Commonwealth*, 267 Va. 178, 204, 590 S.E.2d 520, 535 (2004).

b. Summary argument

The crime of larceny by the receipt of stolen goods is defined by Code §18.2-108 which requires knowledge that the goods were stolen as an essential element of the crime. *Lewis v. Commonwealth*, 225 Va. 497, 303 S.E.2d 890 (1983). Absent proof of an admission against interest, the knowledge required by Code § 18.2-108 that the goods received were stolen property must be shown by circumstantial evidence. *Id.*

Collins never admitted that he knew the motorcycle had been stolen. Nor was he in possession of recently stolen property. The judgment of the trial court was plainly wrong because it was based on circumstantial evidence and unreasonable inferences from certain facts that were in evidence.

The bulk of the evidence against Collins came from testimony by Officer Rhodes. Officer Rhodes lied repeatedly under oath and misled the court(s) in several material ways. In fact, he was so thoroughly impeached with his own inconsistent statements that he apologized to the court and blamed them on his being sick.

The trial court acknowledged Officer Rhodes' "confusion" but stated that Officer McCall's testimony was almost identical. As will be shown, this is not the

case. Officer McCall's testimony was quite narrow and he provided a context to Collins' statements that supports Collins' argument and that Officer Rhodes had attempted to obscure.

Moreover, the only evidence that Collins may have even suspected that the motorcycle had been stolen was supplied by Eric Jones. Jones' version of events was clearly self-serving and inconsistent with other known facts as presented in court.

c. Officer Rhodes lied repeatedly under oath and intentionally misled the court(s) in several material ways

First, Officer Rhodes misled the courts regarding his use of photographs to interrogate Collins about the alleged incidents of eluding. As a factual matter, Officer Rhodes first showed Collins the still photo taken from the eluding incident on July 25, 2013 (J.A. 129) and only later showed him two photographs taken of Collins' Facebook page (J.A. 124-125). However, Officer Rhodes, by his own admission, failed to mention the existence of the eluding photo in his reports (to which counsel had access through the open file policy of the Commonwealth's attorney) and did not disclose the existence of the photo during the preliminary hearing in the General District Court on this matter.

The existence of the eluding photo was first revealed publicly during cross-examination of Officer Rhodes at a pre-trial hearing in the Circuit Court on April 30, 2014. The Commonwealth knew of this photograph prior to the pre-trial hearing because the Commonwealth actually provided the copy of the photograph submitted as defense exhibit 1.

Officer Rhodes, by his omissions, clearly intended for the court to infer that every statement attributed to Collins about motorcycles was in response solely to his own Facebook photos and not specifically to the allegation that he was the driver in the eluding photo. This was clearly not the truth. Officer Rhodes failed to reveal the whole truth and failed to testify to the whole truth until confronted on cross-examination.

Second, Officer Rhodes misled the courts regarding when he first became aware of the Facebook photos. After extensive cross-examination at trial, Officer Rhodes admitted that the first time he had seen the photos on Collins' Facebook page was September 10, 2014.

However, during the preliminary hearing in the General District Court, Officer Rhodes had stated the photos of the Silver Accura and the motorcycle were posted on his Facebook page on July 25, 2014 but were subsequently taken down. He specifically stated that he had inquired about them after July 25 and before September 10 but that the photos had been taken down from his Facebook page.

Officer Rhodes clearly intended for the court to infer that (a) Collins was in possession of the motorcycle on July 25, 2013 and (b) he took the photos down from public view on his Facebook page out of consciousness of guilt regarding the eluding charge.

Independent evidence at trial revealed that Collins did not come into possession of the motorcycle until some time in early August (likely on or after August 8), that it was parked in plain view at his residence on Northfields Circle for the remainder of the month of

August and only moved to the address on Dellmead Lane in early September. In fact neither Collins nor his girlfriend resided on Dellmead until after August 8, 2013. Thus, the photographs were not and could not have been posted on his Facebook page on July 25 as asserted by Officer Rhodes under oath.

Third, Officer Rhodes made numerous inconsistent statements regarding his interactions with Jones. On July 25, 2013, Officer Rhodes had reason to suspect that Eric Jones was the driver of the motorcycle involved in the eluding incident. He had already researched the tag number and it was associated with Jones. Officer Rhodes was unable to tell if the driver on July 25, 2013 was white or black. However, he had discussed the matter with Officer McCall and should have known that the driver of the motorcycle on June 4, 2013 was "dark-skinned."[1]

At the preliminary hearing in the General District Court, Officer Rhodes at first stated that he spoke to Jones on July 25, 2013. He later said he could not remember the exact date but it was after July 25 and before September 10. He said that Jones told him he had sold the motorcycle. However, Officer Rhodes stated that Jones was not the source of his information about Collins being the driver on July 25. He said that Jones was very difficult to contact.

At trial, Officer Rhodes denied speaking to Jones before September 10. When pressed on his inconsistent statement, Officer Rhodes admitted that had

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[1] The trial court was able to observe that Jones was black while Collins was white.

mis-spoken, that another officer had spoken to Jones and that he (Rhodes) should have revealed that (J.A. 203). When pressed further about the date that he did speak to Jones, Officer Rhodes stated that he could not recall because he has a professional relationship with Jones as a wrecker driver and sees him on a regular basis (J.A. 203).

After pressing further and pointing out these inconsistencies, Officer Rhodes apologized to the court and blamed his mis-statements on being sick (J.A. 204-206).

Fourth, Officer Rhodes made numerous inconsistent statements about his prior attempts to contact Collins at his residence. Officer Rhodes has had numerous dealings with Collins in the past and knew where he lived on Northfields Circle. Assuming that he and Officer McCall had good reason to suspect that Collins was guilty of eluding them on a motorcycle on July 25 and June 4, 2013 respectively, he would logically make a concerted effort to contact Collins at his home.

At the preliminary hearing, Officer Rhodes stated that (a) he had driven by the house several times, (b) he never saw a motorcycle, (c) he had knocked on the door once, (d) another officer also knocked on the door, (e) no one ever responded at the door.

At the pre-trial hearing in the Circuit Court, Officer Rhodes stated that never attempted to make contact with Collins at his home. He testified then that he had tried to make phone contact with Collins once and drove by his house one time.

When confronted with his inconsistencies he claimed "I don't recall." He then said Officer Hooper

had gone by there several times on his behalf, that he (Rhodes) had made several loops through the neighborhood and then that he did actually go to the door but could not recall how many times.

All of his statements stand in stark contrast to Roberts unimpeached testimony that (a) the motorcycle sat in her driveway in plain view for most of the month of August and (b) that no law enforcement officer ever came to the door looking for her son.

d. Officer McCalls testimony differed from Officer Rhodes' testimony in several material aspects and ultimately supported Collins' argument

Collins argued that Officer Rhodes had exhibited such a bias against him by his misleading omissions and his numerous inconsistent statements that any statement attributed to him by Officer Rhodes should be not given weight as an accurate expression of what he actually said and the context within which the words were spoken. The court acknowledged the argument by noting Officer Rhodes' confusion as to what he remembered but then noted that Officer McCall's testimony was almost identical to Officer Rhodes (J.A. 262). This is inconsistent with the facts as presented at trial.

Officer McCall testified that after speaking to Collins about the automobile that he had attempted to register at DMV, he spoke specifically about the eluding incident on June 4, 2013. He told Collins that he (McCall) believed Collins was the driver and admitted that he was essentially accusing Collins of a crime. He testified that Collins responded to this

particular accusation by saying the "he hadn't owned a motorcycle in months, hadn't driven a motorcycle in months, and that it wasn't him." Collins later said that the last motorcycle he owned was green.

Officer McCall does not testify to any statement that Collins may or may not have made in response to either the eluding photo (which was Officer Rhodes' case) or Facebook photos. In fact, Officer Rhodes had testified that he had taken Facebook photos while Officer McCall was talking to Collins. Thus, all statements attributed to Collins by Officer McCall occurred before Collins was confronted with the photographs from his own Facebook page.

Moreover, Collins knew that on June 4, 2013, he had been present in the Circuit Court of Charlottesville for a scheduled trial and was still under the constraints of home electronic incarceration until the following day. He also knew that he did not own that motorcycle on June 4, 2013. Thus, in his mind, any allegation that he had been driving any motorcycle on June 4, 2013 was clearly false. He was also, at that time, pre-occupied with another false allegation of attempting to register a stolen vehicle.

Collins statements to Officer McCall must be viewed in this context a young man confronted with multiple police officers making multiple false accusations of criminal activity. Yet this is precisely the context that Officer Rhodes attempted to obscure by failing to reveal the existence of the eluding photo and implying that Collins' statements about the motorcycle were solely in response to his own Facebook page photos.

Collins statement about ownership of a motorcycle was certainly not true. He did own a motorcycle but at this stage of the investigation and questioning, it is not clear whether Collins had been shown any photograph of it. Officer McCall mentioned no photographs in his testimony and testified that Collins was responding to his accusation of eluding. Collins, out of self-interest, simply chose to deflect all questions about any motorcycle.

Collins statement that he had not driven a motorcycle in months, while not entirely true, was substantially true at least in the context of a false allegation of eluding which had occurred two months previously. His mother specifically stated that, after the motorcycle was delivered to her house in early August, Collins did not drive it because it needed new tires. He later admitted that he drove the motorcycle in early September from his mother's house to a shop for new tires and then to Dellmead where it was parked. Collins knew that the motorcycle was not registered and in the context of a false allegation of eluding, he was under no obligation to incriminate himself with even a minor traffic infraction.

Finally, Collins' statement that "it wasn't him" was true and there was not a shred of evidence presented at trial to conclude that it was not true. Officer Rhodes admitted that, to this day, he has no probable cause to charge Collins with eluding.

Officer McCall's testimony differed from that of Officer Rhodes in that Officer Rhodes focused on Collins' response to Facebook photos whereas Officer McCall focused on Collins' response to a specific false allegation of eluding without reference to any

photographs. Moreover, Officer McCall was unable to validate anything Officer Rhodes may have said or heard when he confronted Collins at the Dellmead address. The only evidence at trial of Collins' responses to either the Facebook photos or the actual motorcycle at Dellmead came only from Officer Rhodes, not Officer McCall.

Thus, the trial court was plainly wrong to conclude that Officer McCall's testimony was almost identical to that of Officer Rhodes. Every human being when confronted with multiple police officers making multiple accusations that he knows to be false will respond differently. Collins argued that his mis-statements were uttered in response to false allegations of eluding. Officer McCall's testimony supports this claim.

To infer that Collins' statements to Officer McCall are proof that he knew the motorcycle was stolen is unreasonable. To conclude beyond a reasonable doubt, based solely on those statements in the context within which they were uttered, that he knew the motorcycle was stolen is plainly wrong.

e. Jones' testimony was inconsistent with known facts and inherently incredible

Jones testified that he sold the motorcycle to Collins at the end of April and that Collins had inspected it at his work place prior to purchasing it. During this period of time, Collins was on court-ordered home electronic incarceration and could not have visited his place of employment without being reported in violation. Collins introduced evidence to show that he did not purchase the bike until early August.

Jones testified that he had paid $2800 for the bike and sold it less than two months later for only $1800. He further admitted that he later tried to buy it back from Collins. The most logical inference from these facts would be that Jones wanted to get rid of the bike fast because he knew he could get accused of eluding the police. He offered to buy it back later when no one contacted him about the eluding charge.

Jones testified that Collins wanted to put a new frame on the bike in order to convert it to a racing bike. Yet Jones stated that he was already using the bike exclusively as a racing bike. He admitted that a bike with frame damage might not have a title and would not be street legal. A new frame might be necessary in order to convert the bike to one that could be properly titled and registered for street use but it would not be necessary to continue using it as a racing bike. Jones' testimony on this point makes no logical sense.

Jones admitted that he did not know that the bike had been stolen and that he never told Collins that it was stolen. He only assumed that it might have been stolen because it had no title. Jones most likely told Collins that it had no title because it had sustained frame damage and was no longer legal to register it for street use. This would explain why (a) Jones used the bike exclusively for racing, (b) why Collins stated that he would need to replace the frame and (c) why the price was so low.

Jones' testimony, even if taken as true in its entirety, might cause a prudent person to believe that the bike might have been stolen but was insufficient to prove actual knowledge as required by Virginia law.

f. Conclusion

For the foregoing reasons, this court should find that the trial court erred in denying Collins' motion to strike evidence, reverse his conviction and dismiss the indictment against him.

CONCLUSION

The Appellant, Ryan Austin Collins, respectfully prays that, as to the assignments of error, this Honorable Court find that the trial court erred, reverse the judgment of the trial court and either remand the matter back to the trial court for further proceedings consistent with this ruling or dismiss the indictment against him.

2015 WL 4977972 (Va.App.)

COURT OF APPEALS OF VIRGINIA

No. 1096-14-2

[Filed February 19, 2015]

RYAN AUSTIN COLLINS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF FOR THE COMMONWEALTH

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[*Tables Omitted in the Printing of this Appendix*]

STATEMENT OF THE CASE

The issues presented in this appeal are whether the police had probable cause to search the motorcycle in the driveway of defendant Ryan Austin Collins's residence without first obtaining a warrant; and whether the evidence was sufficient to sustain his conviction for receiving stolen property.

On April 30, 2014, the Albemarle County Circuit Court denied the defendant's motion to suppress evidence. (App. 118-21, 268). The following week, the trial court, sitting without a jury, convicted Collins of receiving stolen property and sentenced him to three years in prison, with all but two months suspended. (App. 271).

ASSIGNMENTS OF ERROR

I. **THE TRIAL COURT ERRED IN DENYING COLLINS'S MOTION TO SUPPRESS THE EVIDENCE RELATED TO THE MOTORCYCLE BECAUSE THE OFFICER ILLEGALLY TRESPASSED ONTO PRIVATE PROPERTY FOR THE PURPOSE OF CONDUCTING A SEARCH IN VIOLATION OF HIS FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES.**

II. **THE TRIAL COURT ERRED IN DENYING COLLINS'S MOTION TO STRIKE THE EVIDENCE AND FINDING HIM GUILTY BECAUSE THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO PROCE THAT HE HAD ACTUAL**

KNOWLEDGE THAT THE MOTORCYCLE WAS STOLEN.

STATEMENT OF FACTS

SUPPRESSION HEARING

On July 25, 2013, Officer David Rhodes, Albemarle County Police Department, was on patrol and noticed a motorcycle coming from behind him at a high rate of speed. (App. 65-66, 79). Rhodes activated his radar, which indicated the motorcycle was traveling at 100 mph in a posted 55 mph zone. (App. 79). The motorcycle passed him on his left. Rhodes made eye-contact with the driver, but could not identify him because he wore a helmet with a tinted shield. Rhodes activated his emergency equipment and attempted to stop the motorcycle. The motorcycle "took off at a very high rate of speed [exceeding] 140 mph." (App. 80). Rhodes pursued the motorcycle until it drove onto the interstate. Rhodes then stopped the pursuit because the driver "was driving too reckless." (App. 80).

During the incident, Rhodes took a picture of the motorcycle and recorded the "tag number." (App. 88-89, 91). The tag number came back not "on file." Further investigation established the tag had been inactive for several years and was last used by Eric Jones. (App. 91). Sometime after July 25, 2013, Rhodes developed Collins as a suspect with regard to the identity of the driver on the motorcycle. (App. 95).

On September 10, 2013, while on patrol, Officer Rhodes heard Collins's name on the radio. Other officers were investigating Collins in reference to a vehicle he was attempting to register at the DMV. Rhodes went to the DMV to talk with Collins about his

attempted stop of the motorcycle on July 25, 2013. (App. 66). During his conversation with Collins, Rhodes showed him two photographs he had obtained from Collins's Facebook page. (App. 67). The first photograph depicted a residence with several vehicles parked in the driveway and one in front of the house on the street. The second Facebook photograph showed an orange and black motorcycle parked between a black sedan and a silver Toyota 4-Runner at the same residence. (App. 68-69, 124-125). Officer Rhodes asked Collins if he knew where the house was located or where the motorcycle in the photograph was located. Collins told Rhodes "he didn't know anything about it or where it was located." (App. 78).

At the suppression hearing, Officer Rhodes described the motorcycle in the photograph as having "been stretched out." By that he meant that the rear end had been added onto the motorcycle to make it longer and that normally indicated the motorcycle was not a "conventional motorcycle," but was a "racing type" used in drag racing. (App. 69). Officer Rhodes also noted that the motorcycle had chrome wheels and a chrome swing arm "which was somewhat unique to that motorcycle." (App. 69). Rhodes noted that you "normally" do not see someone driving down the road on such a motorcycle. It was a "customized" motorcycle and not something that could be bought "from the factory." (App. 69-70). When Officer Rhodes saw the photograph of the motorcycle on Collins's Facebook page, he was "100% sure that that was the same motorcycle that had not stopped for [him] on the bypass based on looking at it. It was very distinctive and [he] knew, absolutely no question in [his] mind that was the same motorcycle." (App. 100).

After finishing his conversation with Collins, Officer Rhodes learned through an informant that the house in the Facebook photograph was on Dellmeade Avenue in the City of Charlottesville, about a block away from the Albemarle County line. (App. 70-71). Rhodes went to Dellmeade Avenue and found the house in the photograph. From the roadway, Rhodes could see a motorcycle underneath a cover at 2304 Dellmeade Avenue. The motorcycle was in virtually the same position as the one in the photograph and, just as in the Facebook photograph, was parked next to a silver Toyota 4-Runner. Based on the silhouette and visible chrome sticking out from underneath the cover, the motorcycle "appeared to be the same motorcycle that [Rhodes] had attempted to stop...." (App. 72). Rhodes could tell from the silhouette that the motorcycle was not a conventional motorcycle because it was "much longer" than what a normal motorcycle would look like underneath a cover. (App. 73).

Because of the mobile nature of the motorcycle, Officer Rhodes walked up the driveway about one car length and lifted the cover off of the motorcycle. (App. 74, 90). Rhodes confirmed when he took the cover off, because of its distinctive nature, it was the same motorcycle for which he had been looking. (App. 100). Rhodes first ran the tag number on the motorcycle, which was different than the tag number he had seen on it on July 25, 2013. The new tag number came back to a Kawasaki motorcycle from Waynesboro. Based upon that information, Rhodes acquired the VIN number off the motorcycle.

According to Collins's girlfriend, Kandace Beach, who moved to 2304 Dellmeade Avenue on August 8,

2013, Collins would spend "a couple of nights per week" at the residence and was there the night of September 9-10, 2013. (App. 103-104). The motorcycle in the Facebook picture that had been introduced into evidence had only been parked in the driveway for approximately one week prior to September 10, 2013. (App. 106).

May 7, 2013 Trial

Eric Jones testified that he purchased a motorcycle for $2800 in March, 2013. (App. 139, 144). When he bought the motorcycle, it lacked a title. (App. 140). He initially testified that the motorcycle was stolen, but then clarified that he was never told it was stolen, but he knew as much because there was no title. (Id.). Around the end of April 2013, Jones sold the motorcycle to Collins for $1800. (App. 140-41). When he sold the motorcycle to Collins, Jones told him it lacked a title and "it's possibly stolen." (App. 159). Jones, however, did have a key to the motorcycle. (App. 142). Collins told Jones he was not concerned about the lack of title or that it was stolen because he intended to turn the motorcycle into a racing bike. (App. 142, 146).

Both Officers Matthew McCall and David Rhodes responded to the DMV on September 10, 2013, in order to ask Collins about separate eluding incidents the officers had observed with a motorcycle. (App. 161, 172-73). Other officers had been called to the DMV to speak with Collins regarding his attempt to register an Acura SUV that had been reported stolen, which was later found not to have been stolen. (App. 168-69).

Officer McCall questioned Collins after advising him of his Miranda rights about the motorcycle

involved in an eluding incident that occurred prior to the eluding incident involving Officer Rhodes. (App. 162). Collins responded that he had not owned or driven a motorcycle in months and that it was not him, and also that the last motorcycle he had owned was green. (App. 163-64). The motorcycle in this eluding incident was orange and black with an extended frame. (App. 166). The earlier incident occurred around June 4th, although McCall was not certain of the exact date. (App. 165-66).

Officer Rhodes responded to the DMV to speak with Collins about the eluding incident that occurred on July 25, 2013. (App. 173-74). Through other sources, Rhodes determined that the likely driver of the motorcycle on July 25th was Collins. (App. 175).[1]

While at the DMV, Officer Rhodes looked up Collins's Facebook page and took two pictures with his phone of pictures on Collins's Facebook page. (App. 175). Rhodes recognized the motorcycle in the pictures as the one involved in the eluding incident. (App. 176). When shown the photos, Collins responded that he neither knew anything about it nor where the motorcycle was located. (App. 175-76). Collins added that he had not ridden a motorcycle in a few months. (App. 178). The Facebook page photographs shown to Collins, showed a motorcycle in the driveway of a home and that motorcycle was the one Rhodes had "attempted to stop" on July 25, 2013. (App. 176).

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[1] Officer Rhodes's source turned out to be another officer who knew Jones and had talked to him about the motorcycle. Jones had told the other officer he had sold it to Collins, and that officer related that information to Rhodes. (App. 203).

Later on September 10, 2013, Officer Rhodes continued to investigate the location of the house in the pictures and ultimately came to 2304 Dellmeade Avenue. (App. 178). While still in his police car from the street, Rhodes could see the motorcycle in the driveway, which was covered with a white tarp. (App. 178-79). It was parked in front of a silver SUV at the same angle and in about the same spot as the motorcycle in the Facebook photographs. (App. 179). Officer Rhodes could see that the motorcycle was much longer than an average motorcycle by its silhouette under the cover. (Id.). Officer Rhodes could see the wheels were chrome. (App. 179).

From the sidewalk, Officer Rhodes took a picture of the motorcycle with the cover on it. (App. 179). Officer Rhodes then proceeded to walk up to the motorcycle and remove the cover in order to find a license plate or VIN number. (*Id.*). The license plate on the motorcycle was different than the one Rhodes had seen on the same motorcycle on July 25th and this second tag came back to a different motorcycle located in Waynesboro. (App. 180). The VIN number came back as belonging to a motorcycle stolen in New York. (App. 181). Upon seeing the motorcycle, Officer Rhodes was 100% certain it was the same one that had eluded him on July 25th and the same one in the Facebook photos. (App. 180).

Officer Rhodes came back to the residence on Dellmeade Avenue that same day and knocked on the door. (App. 182). Collins came to the door dressed in a long sleeved shirt and Timberland style boots, "the same exact boots that the rider was wearing...the day [Rhodes] tried to stop the motorcycle." (App. 182). Throughout the conversation, Collins's story changed

several times. First, Collins stated he did not know anything about the motorcycle and then he told Rhodes it was a friend's motorcycle. Eventually, however, Collins stated he had bought the motorcycle from Eric Jones. (App. 183). Collins told Rhodes the last time he moved the motorcycle was about a week earlier. (App. 183). When confronted with information showing the motorcycle had been serviced at Jarman's, Collins admitted to driving it there to get new tires put on it. (App. 183-84). Collins explained the license plate number on the motorcycle by asserting that it had been the plate on another motorcycle he had previously sold. (App. 184).

Collins was then arrested and Rhodes conducted a search incident to arrest. Rhodes uncovered a key in Collins's pants pocket which fit the motorcycle in the driveway. (App. 185).

Kandace Beach testified that she lived at the Dellmeade address from August 8, 2013 through September 10, 2013. (App. 228). The motorcycle had been at the Dellmeade address for about a week prior to September 10, 2013. Beach had lived intermittently at Collins's mother's home on Northfields Circle, and had spent "a good bit of time" at the Northfields Circle home with Collins. Beach testified, however, that she had never seen the motorcycle at the Northfields address. (App. 226, 228).

Collins's mother, Terri Roberts, who lives at the Northfields Circle home, testified that the motorcycle from the Facebook photos was parked in front of her home for more than a month in August. (App. 231-32, 234, 237).

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DENYING COLLINS'S MOTION TO SUPPRESS BECAUSE THE OFFICER HAD PROBABLE CAUSE TO CONDUCT THE SEARCH AND THE MOTORCYCLE WAS MOVABLE.

The issue in this case is whether the officer properly conducted the search of the motorcycle in the driveway of Collins's residence. The defendant, as he did at trial, argues that Rhodes did not have probable cause and there were no exigent circumstances justifying Rhodes's walking up the driveway and removing the tarp.

Standard of Review

On appeal, when there is a challenge to a trial court's denial of a motion to suppress, this Court views the evidence "in the light most favorable to the Commonwealth, giving it the benefit of any reasonable inferences." *Glenn v. Commonwealth*, 49 Va. App. 413, 416, 642 S.E.2d 282, 283 (2007) (en banc) (internal quotation marks omitted), aff'd, 275 Va. 123, 654 S.E.2d 910 (2008); see also *Elliott v. Commonwealth*, 61 Va. App. 48, 51, 733 S.E.2d 146, 148 (2012) ("In doing so, we consider facts presented both at the suppression hearing and at trial."). The appellate court gives deference to the factual findings of the trial court but determines de novo whether the facts were properly applied to the law and the evidence was obtained in accordance with constitutional requirements. *See McCain v. Commonwealth*, 261 Va. 483, 490, 545 S.E.2d 541, 545 (2001).

Analysis

Collins, as he did at trial, relies on two recent cases from the United States Supreme Court: *Florida v. Jardines,* 133 S.Ct. 1409 (2013), and *United States v. Jones,* 132 S.Ct. 945 (2012). Jones involved placement by law enforcement officers of a GPS device on the defendant's car. The Court held that such a trespass to property constituted a search. *Id.* at 949. The Court reasoned that the government's physical occupation of private property "for the purpose of obtaining information" constituted a search. *Id.* Importantly, the Court refused to consider the government's alternative argument that the search was reasonable because it had been supported by either reasonable suspicion or probable cause because the government had failed to raise that argument below. *Id.* at 954.

Jardines involved a police officer walking to the front porch of Jardines's home with a narcotics dog. The Court held that this simple approach to the house did not implicate the Fourth Amendment, but that bringing the dog for purposes of obtaining information beyond the threshold constituted a search because even though the officer was implicitly allowed to approach the house as any private citizen would have been able to, his use of the dog exceeded the scope of that implied consent. 133 S.Ct. at 1415-16.

Collins's reliance on Jones and Jardines is misplaced, and his assertion that no probable cause existed in this case fails to acknowledge the facts available to Officer Rhodes prior to his walking down the driveway toward the covered motorcycle.

The rule that a search of a home without a warrant is presumptively unreasonable "is subject to certain reasonable exceptions." *Kentucky v. King,* 131 S.Ct. 1849, 1856 (2011). *King* noted that even the threshold of a house could be crossed without a warrant if exigent circumstances existed. *Id.* "'One well-recognized exception applies when "the exigencies of the situation" make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" *Id.* (quoting *Mincey v. Arizona,* 437 U.S. 385, 394 (1978), and citing *Payton v. New York,* 445 U.S. 573, 590 (1980) ('[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant')." Jardines noted the Court had added to the reasonable expectation test established in *Katz v. United States,* 389 U.S. 347 (1967), by announcing a physical intrusion test in *Jones.* 133 S.Ct. at 1417. In sum, neither *Jardines* nor *Jones* limited nor nullified the long standing precedent establishing exceptions to the warrant requirement.

The Virginia Supreme Court has also noted that a search of a dwelling or the curtilage is presumptively unreasonable unless probable cause and exigent circumstances exist.

The "Fourth Amendment protects the curtilage of a house and... the extent of the curtilage is determined by factors that bear upon whether an individual reasonably may expect that the area in question should be treated as the home itself." *United States v. Dunn,* 480 U.S. 294, 300 (1987). When government agents conduct a search or seizure within protected areas of a

dwelling without a warrant such actions are presumptively unreasonable, *Payton v. New York*, 445 U.S. 573, 586-87 (1980), and ***unlawful unless they are supported by both probable cause and exigent circumstances***. *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002).

Robinson v. Commonwealth, 273 Va. 26, 34, 639 S.E.2d 217, 221 (2007) (emphasis added). In analyzing such a situation, this Court noted as follows:

> In each such case, the court must determine "whether the law enforcement officers had probable cause at the time of their warrantless entry to believe that cognizable exigent circumstances were present." *Keeter v. Commonwealth*, 222 Va. 134, 141, 278 S.E. 2d 841, 846 (1981) (entry to prevent destruction of evidence). We evaluate the existence of probable cause under a standard of objective reasonableness. *See, e. g., Whren v. United States*, 517 U.S. 806, 813 (1996). "The officers are not required to possess either the gift of prophecy or the infallible wisdom that comes only with hindsight. They must be judged by their reaction to circumstances as they reasonably appeared to trained law enforcement officers to exist when the decision to enter was made." *Keeter*, 222 Va. at 141, 278 S.E. 2d at 846.

Cherry v. Commonwealth, 44 Va. App. 347, 357, 605 S.E.2d 297, 301-02 (2004).

"[P]robable cause exists when 'there is a fair probability that contraband or evidence of a crime will

be found in a particular place.'" *Jones v. Commonwealth*, 277 Va. 171, 178, 670 S.E.2d 727, 731 (2009) (quoting United *States v. Grubbs*, 547 U.S. 90, 95 (2006) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). Although probable cause is a higher standard than reasonable suspicion, it "'requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.'" *Joyce v. Commonwealth*, 56 Va. App. 646, 659, 696 S.E.2d 237, 243 (2010) (quoting Gates, 462 U.S. at 243 n.13). The evidence in this case establishes probable cause to believe evidence related to the crime Rhodes was investigating would be found by searching the motorcycle and that the motorcycle Rhodes had been trying to locate was under the tarp.

Furthermore, the facts of the present case fall clearly within an established exception, the automobile exception. As the United States Supreme Court has consistently held "[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment ... permits police to search the vehicle without more.'" *Maryland v. Dyson*, 527 U.S. 465, 467 (2013) (per curiam). *Dyson* made clear that exigent circumstances are presumed when an operational vehicle is involved. Id. at 466-67. When the automobile exception applies, police officers may "conduct a search of the vehicle that is as thorough as a magistrate could authorize in a warrant particularly describing the place to be searched." United *States v. Ross*, 456 U.S. 798, 800 (1982) (internal quotation and citation omitted); *see also Zurcher v. Stanford Daily*, 436 U.S. 547, 555 (1978) ("Search warrants are not directed at persons; they authorize the search of places and the seizure of things, and as a constitutional

matter they need not even name the person from whom the things will be seized.").

Officer Rhodes was investigating a felony speeding to elude case. He had observed a uniquely configured motorcycle pass him at 100 mph when he activated his emergency equipment and pursued it. The motorcycle did not stop and Rhodes discontinued the pursuit because the motorcycle was being driven "too reckless [ly]," at 140 mph (App. 80). Since the rider had a tinted shield, Rhodes was unable to identify him, but Rhodes nevertheless continued to investigate the matter.[2] After the incident, Rhodes developed Collins as a suspect. Having found the motorcycle on Collins's Facebook page, and then having located the address that corresponded with what he had seen on the Facebook page, Rhodes was putting the pieces together.

When he observed the covered motorcycle, which appeared to be the same as the one in the Facebook

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[2] Section 46.2-817 provides, in pertinent part as follows:

> B. Any person who, having received a visible or audible signal from any law-enforcement officer to bring his motor vehicle to a stop, drives such motor vehicle in a willful and wanton disregard of such signal so as to interfere with or endanger the operation of the law-enforcement vehicle or endanger a person is guilty of a Class 6 felony. It shall be an affirmative defense to a charge of a violation of this subsection if the defendant shows he reasonably believed he was being pursued by a person other than a law-enforcement officer.

Given the speeds involved and Rhodes need to break-off his pursuit due to the reckless nature in which the motorcycle was being drive (at 140 mph), the conduct he observed on July 25, 2013 was felonious.

page photograph and the one that had eluded him, Rhodes approached the object to obtain information about its licensure and registration to further his investigation of who had been driving it on July 25, 2013.[3] (App. 97-98, 179). The covered motorcycle was parked at nearly the identical angle and in about the same spot in relation to the silver SUV as in the Facebook photograph. It also had the same chrome wheels and stretched silhouette as the motorcycle for which Rhodes had been searching. Given the particular facts and circumstances of this case, Rhodes had probable cause to believe that the covered motorcycle in the driveway at 2304 Del Avenue was the same motorcycle. In short, it was evidence connected to a crime and likely to help him identify the rider through information on the motorcycle such as the VIN number. *See Florida v. White,* 526 U.S. 559, 565 (1999) (upholding seizure of a car from a public place where police had probable cause to believe the car was evidence of a crime); *United States v. Nielsen,* 9 F.3d 1487, 1489-90 (10th Cir. 1993) ("Probable cause to search a vehicle is established if, under the totality of the circumstances, there is a fair probability that the car contains contraband or evidence.") *cf. Shaver v. Commonwealth,* 30 Va. App. 789, 793, 797, 520 S.E.2d

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[3] One type of routine stop or seizure occurs on the lesser standard of reasonable suspicion. An officer who develops such reasonable suspicion concerning a person may stop that person "in order to identify him, to question him briefly, or to detain him briefly while attempting to obtain additional information" in order to confirm or dispel his suspicions. *Hayes v. Florida,* 470 U.S. 811, 816 (1985). An officer with probable cause that an item is linked to a crime can search the item to determine ownership and "identify" someone that may be able to further his investigation.

389, 395, 397 (1999) (holding appellant had no expectation of privacy when driveway where stolen goods were located was completely visible from the road).

Further, Collins's assertion that the trial court erred in some fashion by not making an explicit ruling on exigent circumstances ignores the well-founded automobile exception to the warrant requirement, which requires no independent finding of exigent circumstances.[4] *See Dyson,* 527 U.S. at 466-67. As Dyson stated:

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[4] Collins also implies, without any citation to authority, that Rhodes could have stood guard while another officer obtained a search warrant. (Def. Br. at 19). His argument implicitly concedes Rhodes had probable cause and, in any event, is contrary to the law surrounding the automobile exception. "'For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.' *Ross,* 456 U.S. at 807 n. 9 (quoting *Chambers v. Maroney,* 399 U.S. 42, 52 (1970)). *See also Commonwealth v. Bakoian,* 588 N.E.2d 667, 672-673 (Mass. 1992) ("In attempting to strike a balance between a defendant's privacy interests and the interests of the police in situations such as this, we have followed the Supreme Court's initiative and granted police 'leeway ... to conduct immediate searches of automobiles in lieu of holding them pending a warrant,' based on the diminished expectation of privacy generally attaching to automobiles. For this reason we hold that the judge erred in concluding that the ability of the police to guard the vehicle while a warrant was sought removed the exigency attending the situation.") (citations omitted). Further, courts have accorded a lesser expectation of privacy in automobiles than in a home or other building. *See Shirley v. Commonwealth,* 218 Va. 49, 55, 235 S.E.2d 432, 435 (1977).

> Under our established precedent, the "automobile exception" has no separate exigency requirement. We made this clear... when we said that in cases where there was probable cause to search a vehicle ***"a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not been actually obtained."***

527 U.S. at 466-67 (emphasis added by *Dyson)* (quoting *Ross,* 456 U.S. at 809); *see also Pennsylvania v. Labron,* 518 U.S. 938, 940 (1996) (an automobile's inherent mobility is "an exigency sufficient to excuse failure to obtain a search warrant once probable cause to conduct the search is clear.").

In sum, the trial judge did not err in denying the motion to suppress because Officer Rhodes had probable cause to believe that he would find evidence related to his investigation and the motorcycles uncontested mobility satisfied the exigency requirement.[5]

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[5] The record established that the motorcycle had been at the Dellmeade address for only one week at the time of the search and that it had been moved at least once during that week to obtain new tires.

II. THE TRIAL COURT DID NOT ERR IN DENYING COLLINS'S MOTION TO STRIKE THE EVIDENCE AND ITS FINDING COLLINS GUILTY WAS NOT PLAINLY WRONG OR WITHOUT EVIDENTIARY SUPPORT.

Standard of Review

On appeal of a challenge to the sufficiency of the evidence, this Court views the record in the light most favorable to the Commonwealth, the prevailing party at trial. *Stevenson v. Commonwealth,* 258 Va. 485, 488, 522 S.E.2d 368, 368 (1999); *Henry v. Commonwealth,* 63 Va. App. 30, 35, 753 S.E.2d 868, 870 (2014). To do so, the Court "'discard[s] all evidence of the accused that conflicts with that of the Commonwealth.'" *Id.* at 37, 753 S.E.2d at 871 (quoting *Holcomb v. Commonwealth,* 58 Va. App. 339, 346, 709 S.E.2d 711, 714 (2011)). The Court also accepts as true all the credible evidence favorable to the prosecution as well as all fair inferences in support of the conviction that may be drawn from the record. *Id.* "When reviewing the sufficiency of the evidence to support a conviction, the Court will affirm the judgment unless the judgment is plainly wrong or without evidence to support it." *Bolden v. Commonwealth,* 275 Va. 144, 148, 654 S.E.2d 584, 586 (2008). Evaluation of witness credibility and "the weight accorded the evidence are matters solely for the fact finder who has the opportunity to see and hear that evidence as it is presented." *Sandoval v. Commonwealth,* 20 Va. App. 133, 138, 455 S.E.2d 730, 732 (1995); see also *Swanson v. Commonwealth,* 8 Va. App. 376, 378-79, 382 S.E.2d 258, 259 (1984) (trial judge is in the best position to weigh any inconsistencies in a witness's testimony).

Discussion

Collins's assignment of error asserts the evidence was insufficient because the Commonwealth failed to prove "he had actual knowledge that the motorcycle was stolen." This assertion lacks merit. Guilty knowledge, like any other element, may be shown by conduct and circumstances. *See Young v. Commonwealth,* 275 Va. 587, 591, 659 S.E.2d 308, 310 (2008); *Reaves v. Commonwealth,* 192 Va. 443, 451, 65 S.E.2d 559, 564 (1951). Such conduct may serve as evidence that the defendant knew the nature and character of the contraband that was in his possession. *Id.*

In Collins's case, the trial judge noted the exceptional number of inconsistencies with the proposition that Collins did not know that the motorcycle was stolen when he purchased it. First, Eric Jones testified that he informed Collins the motorcycle had no title and Jones assumed it had been stolen prior to Collins purchasing it from him. Next, both Officers Rhodes and McCall testified that when Collins was confronted about the motorcycle at the DMV on September 10, 2013, Collins stated he had not owned a motorcycle for several months, nor had he driven a motorcycle in the last several months, and the last motorcycle he had owned was green. (App. 262). The trial judge noted that if he had bought the motorcycle from Jones as he subsequently admitted, why did he lie about it. *See Covil v. Commonwealth,* 268 Va. 692, 696, 604 S.E.2d 79, 82 (2004) ("false or evasive account is a circumstance ... that a fact-finder may properly consider as evidence of guilty knowledge.").

The court then noted that Collins's mother had testified that the orange and black motorcycle had been parked at the end of her driveway in the month of August, but the defendant's other witness, Kandace Beach, testified that she was with the defendant at his mother's and had never seen the motorcycle until a week prior to September 10, 2013. (App. 263-64). *Id.* The court clearly concluded that the facts and circumstances, including the accounts of the defendant's witnesses and his own varying explanations, supported an inference that he in fact did know the motorcycle was stolen property when he purchased it.

In addition to the specific points noted by the court in finding Collins guilty, the Commonwealth's evidence established that there was one license tag on the vehicle on July 25, 2013, and it had been changed to a different license plate when it was discovered on September 10, 2013, the inference being, that the rider attempted to disguise and distinguish the vehicle from the one being sought for the eluding offense. There was also no explanation as to why the motorcycle, which based upon Collins's Facebook page and Beach's testimony, had been sitting uncovered prior to Officers Rhodes and McCall meeting with Collins at the DMV on September 10, 2013 was suddenly partially covered by a tarp later that same day when Rhodes tracked down the address of the house on Collins's Facebook page. Finally, Collins flight from Rhodes on July 25, 2013 and McCall on June 4, 2013, give rise to a conclusion that he feared the nature of the motorcycle (stolen) would come to light.

CONCLUSION

For these reasons, the judgment of the Chesapeake Circuit Court should be affirmed.

2016 WL 9024641 (Va.)

SUPREME COURT OF VIRGINIA

No. 151277

[Filed January 26, 2016]

RYAN AUSTIN COLLINS,	)
	)
Appellant,	)
	)
v.	)
	)
COMMONWEALTH OF VIRGINIA,	)
	)
Appellee.	)
	)

OPENING BRIEF OF APPELLANT

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[*Tables Omitted in the Printing of this Appendix*]

STATEMENT OF FACTS

On September 10, 2013, Collins was temporarily detained at the Department of Motor Vehicles (DMV) in Albemarle County for attempting to register a motor vehicle (automobile) which had been reported stolen (J.A. 172-172, 188). It was later discovered that the vehicle had not, in fact, been stolen and this matter is unrelated to the present charge (J.A. 188).

However, during his detention at DMV, Officers Rhodes and McCall of the Albemarle County Police Department, having heard Collins name mentioned on the police radio, proceeded to DMV for the purpose of questioning him about two suspected, but unrelated, instances of eluding while operating a motorcycle (J.A. 162, 173-175). The dates of these incidents were June 4, 2013 involving Officer McCall and July 25, 2013 involving Officer Rhodes respectively (J.A. 85-86, 165-166, 189-190).

During the July eluding incident, Officer Rhodes had recorded the licence plate number on the eluding motorcycle (J.A. 174). DMV records indicated that the license plate was inactive (J.A. 174). Officer Rhodes then checked a local police database (known as PISTOL) and the license plate had been associated with an earlier incident involving Eric Jones (J.A. 174).

At the pre-trial hearing, Officer Rhodes testified that he had spoken to Jones several times but he could not recall the dates (J.A. 93). He stated that spoke to Jones after July 25, 2013 (the date of the eluding incident) and both before and after September 10, 2013 (the date of Collins' arrest) (J.A. 93). Jones told Officer Rhodes that he had sold the motorcycle; however,

Officer Rhodes stated Jones had been difficult to contact and that he had received information linking Collins to the motorcycle from a source other than Jones (J.A. 93-94).

Officer Rhodes had recorded the eluding incident on a video device installed in his police vehicle and subsequently took a still shot of one frame of the video (J.A.190, 129).

While still at DMV, Collins was shown the aforementioned still shot which was a photograph of a person on a motorcycle allegedly speeding away from a police vehicle (J.A.190, 129). Collins denied all knowledge of this or any other eluding incident (J.A. 190-192).

While Officer McCall spoke to Collins, Officer Rhodes went to a police vehicle and took some photographs of Collins Facebook page with his phone (J.A. 175). Another unidentified police officer had access to his Facebook page and permitted Officer Rhodes to photograph it (J.A. 88). One photograph showed a motorcycle, similar to the one Officer Rhodes had encountered, parked at residence in the City of Charlottesville (J.A. 125). A second photograph showed that same residence with a picture of a silver Accura similar to the one Collins was attempting to register at DMV (J.A. 124). Officer Rhodes then showed the photographs of the Facebook page to Collins who, according to Officer Rhodes, denied all knowledge of the motorcycle (J.A. 175).

Officer Rhodes, through other sources, had developed information that a motorcycle similar to the one used to elude the police might be located at an

address on Dellmead Lane in the City of Charlottesville (J.A. 178). Upon arrival at that address, Officer Rhodes saw a motorcycle parked in a private driveway and covered with a tarp (J.A. 178-179). The outline of the motorcycle was similar to the one he had seen on July 25, 2013 and he suspected that it might be the same one (J.A. 179).

Without the consent of anyone residing at the property, Officer Rhodes proceeded onto private property, removed the tarp, examined the motorcycle and recorded both the license plate number and the Vehicle Identification Number (VIN) (J.A. 90-91, 101, 179). The licence plate was not the same one that was on the motorcycle during the eluding incident (J.A. 180). However, DMV records revealed that the licence plate was associated with the different motorcycle and that the VIN was associated with a motorcycle that had been reported stolen out of New York several years prior to this date (J.A. 180-181, 186).

Officer Rhodes set up surveillance of the residence while he developed further evidence (J.A. 182). Later he proceeded to the front door to talk to the resident(s) (J.A. 182). Collins answered the door (J.A. 214).

Collins initially denied knowledge of the motorcycle but later admitted that he had purchased the motorcycle from Eric Jones and that he had recently driven it from his mother's house to Jarman's Sportscycles to get new tires and then to Dellmead Lane (J.A. 183-184). Officer Rhodes then placed Collins under arrest for receiving stolen property (J.A. 185, 197). Officer Rhodes stated that he did not inform Collins that the motorcycle was reported stolen until after he placed him under arrest (J.A. 197).

At a pre-trial hearing, Officer Rhodes justified his trespass onto private property by saying that (a) he needed to verify that this motorcycle was in fact the same one he had encountered during the eluding incident of July 25, 2013; (b) a motorcycle is movable; (c) he needed to verify the owner of the vehicle and whether the owner lived at that address; (d) he needed to verify whether the motorcycle was properly registered; (e) he needed to verify whether the motorcycle was properly insured; (f) he needed to verify whether the operator of the motorcycle was properly licensed to do so (J.A. 97-98). He admitted, however, that the motorcycle itself is not contraband (J.A. 98).

He also admitted that, even after examining the motorcycle and determining all of the foregoing facts related to the motorcycle, he still had no probable cause to charge Collins with eluding (J.A. 98).

SUMMARY OF ARGUMENT

Officer Rhodes of the Albemarle County Police Department entered onto private property without a warrant to search for a motorcycle which he suspected as having been involved in a previous incident of eluding. Once established in the curtilage of the home, he physically removed a tarp which covered the motorcycle and recorded the tag and vehicle identification numbers. After determining that the motorcycle had been reported stolen, he arrested Collins for receiving stolen property.

The Commonwealth does not dispute that Rhodes' actions constituted a warrantless search within the meaning of the Fourth Amendment. Moreover, both the trial court and the Court of Appeals rejected the

Commonwealth's argument that the search was justified by the automobile exception to the warrant requirement.

The trial court held that the search was reasonable because the officer had probable cause to conduct the search. The Commonwealth made no argument for and the trial court made no findings of exigent circumstances. The trial court erred because, assuming without conceding that probable cause existed, exigent circumstances were required to conduct the search without a warrant.

The Court of Appeals correctly held that both probable cause and exigent circumstances were required to justify the trespass and the search. However, the Court of Appeals erred in finding that the officer had probable cause to conduct the search because the motorcycle was not evidence of a crime and was irrelevant to the issue of establishing the identity of the driver in the eluding incident under investigation.

More importantly, the Court of Appeals erred in holding that exigent circumstances existed to justify the warrantless search because (a) the motorcycle was not contraband that could be destroyed, moved or hidden without the knowledge of the police, and (b) Officer Rhodes had both the resources and the time secure a warrant prior to his illegal trespass onto private property.

The Court of Appeals erred in holding that exigent circumstances existed to justify Officer Rhodes warrantless trespass onto private property in order to conduct a search for evidence.

ASSIGNMENTS OF ERROR

1. The trial court erred in denying Collins' motion to suppress the evidence related to the motorcycle because the officer illegally trespassed onto private property for purpose of conducting a search in violation of his Fourth Amendment right to be free of unreasonable searches and seizures. (J.A. 118-121) The Court of Appeals of Virginia erred in upholding the judgment of the trial court and finding that the officer acted lawfully under the Fourth Amendment in entering the property and searching the motorcycle. (J.A. 282)

NATURE OF THE CASE AND MATERIAL PROCEEDINGS IN THE TRIAL COURT

On September 10, 2014, the defendant-appellant, Ryan Austin Collins, was arrested and charged on a warrant with receiving stolen goods having a value of $200.00 or more in violation of Virginia Code § 18.2-108.

On October 17, 2013, the General District Court for Albemarle County found probable cause that Collins had committed the offense and certified the matter to the grand jury.

On December 2, 2013, the grand jury for Albemarle County returned an indictment for the felony offense of receiving stolen goods as charged on the warrant.

On December 18, 2013, Collins filed a motion to suppress all evidence in the case on the grounds that the search and seizure of the evidence was in violation of his Fourth Amendment rights to be free of unreasonable searches and seizures.

On April 30, 2014, the Circuit Court of Albemarle County, upon evidence and argument of counsel, denied his motion to suppress.

On May 7, 2014, Collins was tried by a judge sitting without a jury and was found guilty as charged in the indictment. Final judgment was entered on May 20, 2014.

Mr. Collins filed a timely notice of appeal.

On December 19, 2014, the Court of Appeals granted his appeal. On July 21, 2015, the Court of Appeals of Virginia affirmed the judgment of the trial court.

Mr. Collins noted a timely appeal. On December 16, 2015, the Supreme Court of Virginia awarded him this appeal.

ARGUMENT

I THE TRIAL COURT ERRED IN DENYING COLLINS' MOTION TO SUPPRESS THE EVIDENCE RELATED TO THE MOTORCYCLE BECAUSE THE OFFICER ILLEGALLY TRESPASSED ONTO PRIVATE PROPERTY FOR PURPOSE OF CONDUCTING A SEARCH IN VIOLATION OF HIS FOURTH AMENDMENT RIGHT TO BE FREE OF UNREASONABLE SEARCHES AND SEIZURES

a. *Standard of review*

On appeal, the circuit court's factual findings in denying a motion to suppress are reviewed for clear error, but the circuit court's application of the law is

subject to *de novo* review. *Commonwealth v. Quarles*, 283 Va. 214, 720 S.E.2d 84 (2012).

b. *Officer Rhodes illegally trespassed onto private property for the purpose of conducting a search for evidence*

The government's physical intrusion onto an effect for the purpose of obtaining information constitutes a search within the meaning of the Fourth Amendment. *United States v. Jones*, 565 U.S. 101259 (2012). Fourth Amendment jurisprudence applies not only to a reasonable expectation of privacy but also to common law trespass. Id. A police officer may not enter the curtilage of a home simply to conduct a search without a warrant. *Florida v. Jardines*, 569 U.S. 11564 (2013).

In *Jones*, the U. S. Supreme Court held that the Government's attachment of a GPS device to a vehicle and the use of that device to monitor the vehicle's movements constituted a search under the Fourth Amendment and upheld the suppression of all evidence obtained by the warrantless use of a GPS device. *Jones* at Slip. Op. 1, 12. In that case, the vehicle was parked at the defendant's residence at the time the device was attached. Id. The motor vehicle is an effect protected by the Fourth Amendment. Id.

In *Jardines*, the U. S. Supreme Court held that when the government obtains information by physically intruding on the curtilage of a house, a search within the meaning of the Fourth Amendment has undoubtedly occurred. *Jardines* at Slip. Op. 1. In that case, the police had received an unverified tip that marijuana was being grown at Jardines' home. Id. After a brief period of surveillance, the police entered

the curtilage of the home with a drug detecting dog which gave a positive alert for narcotics at the base of the front door. Id. At Slip. Op. 2. The Court upheld the suppression of all evidence holding that the officers had engaged in a Fourth Amendment search unsupported by probable cause. Id. at Slip. Op. 1, 10.

In this case, several facts are uncontested; namely, (1) Officer Rhodes entered into the curtilage of a home without a warrant and without permission of the residents; (2) he did so for the purpose of conducting a search for a particular motorcycle which was parked in the driveway at the residence; (3) he was investigating the crime of eluding; (4) he had received a tip, the source of which was not disclosed, that Collins may have been the driver that had eluded him on July 25, 2013; (5) he physically removed a tarp which was covering the motorcycle noting its appearance and recording the licence tag number and the Vehicle Identification Number; (6) even after verifying that Collins owned the motorcycle, Officer Rhodes had, and still has, no probable cause to arrest him for the crime of eluding; (7) Collins was an invited overnight guest at the residence and had standing to contest the Fourth Amendment violation.

The trial court opined that *Jardines* was not applicable because it could be distinguished on the facts; specifically, that *Jardines* involved the use a drug detecting dog (J.A. 118-121). The principal issue before the court in *Jardines* was whether the use of a drug detection dog by the police constituted a "search" within the meaning of the Fourth Amendment. *Jardines* at Slip. Op. 1. Yet in this case neither the Commonwealth nor the trial court disputed that Officer

Rhodes had conducted a search. Thus, the trial court relied upon a "distinction" without a difference.

As the U. S. Supreme Court said:

> "...when it comes to the Fourth Amendment, the home is first among equals. At the Amendment's "very core" stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Silverman v. United States, 365 U.S. 505, 511 (1961). This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity ... A license may be implied from the habits of the country," notwithstanding the "strict rule of the English common law as to entry upon a close." *McKee v. Gratz*, 260 U.S. 127, 136 (1922) (Holmes, J.). We have accordingly recognized that "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds." *Breard v. Alexandria*, 341 U.S. 622, 626 (1951). This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant may approach

> a home and knock, precisely because that is "no more than any private citizen might do."

Jardines, 569 U.S. at Slip. Op. 4, 6.

As in *Jardines*, the police in this case trespassed onto private property for the purpose of conducting a search. This act violated the Fourth Amendment.

As the U. S. Supreme Court has said,

> "One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred."

Jardines, 569 U.S. at Slip. Op. 9.

By this standard, this case is easy. Officer Rhodes trespassed onto private property to search for evidence of a crime. Thus Officer Rhodes violated the Fourth Amendment when, without a warrant, he entered onto the curtilage of Collins' home for the purpose of conducting a search for a motorcycle, physically removed the tarp from the motorcycle and conducted a search of the motorcycle. Thus the trial court erred in concluding that the holding in and the logic of *Jardines* were not applicable to this case.

c. *The emergency exception to the warrant requirement does not apply*

Warrantless entry and search of a home or its curtilage require not only probable cause but also exigent circumstances. See, *Warden v. Hayden*, 387 U.S. 294 (1962) (hot pursuit of a suspect armed felon);

Minnesota v. Olsen, 495 U.S. 91 (1990) (imminent risk of destruction of evidence, escape of the suspect, or danger to police or others); *Brigham City v. Stuart*, 547 U.S. 398 (2006) (police reasonably believe an occupant is seriously injured or in imminent danger); *Washington v. Commonwealth*, 60 Va. App. 427, 728 S.E.2d 521 (2012) (exigent circumstances, coupled with a showing of probable cause of house having been broken into, justified warrantless entry into home); *Verez v. Commonwealth*, 230 Va. 405, 410, 337 S.E.2d 749, 752-53 (1985) (warrantless entries are presumed to be unreasonable, in Fourth Amendment terms, casting upon the police a heavy burden of proving justification by exigent circumstances).

(i) Probable cause

The trial court initially expressed some concerns about the applicability of *Jones* to the analysis of this case because in *Jones* the government had forfeited certain arguments. (J.A. 113-114). Collins explained why the fact that the government had forfeited certain arguments in *Jones* did not affect the analysis in this case. (J.A. 114-115).[1] In *Jones*, the Supreme Court held

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[1] The Court of Appeals stated that "More egregiously, appellant fails to note that in Jones, the government forfeited the argument that it had probable cause for the search, and thus the search was lawful **under the automobile exception**, because it had failed to raise the argument below. *Collins*, Ct. App. at 5, n.2. Collins could find no reference to the automobile exception in the *Jones* opinion where cited by the Court of Appeals. *Jones* was cited by Collins for the proposition that a trespass on an effect (i.e., an automobile) was a search under the Fourth Amendment independent of the long standing reasonable expectation of privacy standard. At oral argument, Collins specifically argued that *Jones*

that police trespassed on an effect when they attached a GPS unit to a motor vehicle and used the GPS unit to monitor the vehicle's movements. The trespass alone triggered Fourth Amendment protections under the property rights analysis independent of any "reasonable expectation of privacy." Officer Rhodes, in addition to trespassing on private property when he entered the curtilage of the home, also trespassed on an effect when he removed the tarp from the motorcycle for the purpose of searching for evidence. Unlike the government in *Jones*, Collins was not forfeiting his challenge to the probable cause requirement.

Nonetheless, the trial court held that Officer Rhodes' intrusion onto Collins' property was not unreasonable solely because he had probable cause to conduct the search. (J.A. 121). The trial court erred.

Officer Rhodes could see the outline of a motorcycle from the street but was unable to determine from that vantage point if it was the same one involved in the eluding incident. At that time, he had no reason to suspect that the motorcycle was stolen. Moreover, even if it proved to be the same motorcycle he had encountered on July 25, he had no reason to believe that identifying the motorcycle would enable him to identify Collins as the driver on that date.

Only after physically intruding on Collins' property did he learn that the motorcycle may have been the same one involved in an earlier eluding incident. But

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and *Jardines* created recent precedents in Fourth Amendment jurisprudence which require courts to look beyond the reasonable expectation of privacy standard and determine whether a trespass has occurred.

Officer Rhodes knew that the identity of the driver, not the identity of the motorcycle, was the principal object of his investigation. Even after removing the tarp to search for evidence, he still has not learned and could not have learned who was driving the motorcycle at the time. To this day, Officer Rhodes is without probable cause to charge Collins with eluding.

Moreover, only after physically intruding on Collins' property did he learn that the motorcycle had been reported stolen. Prior to his intrusion, Officer Rhodes had no suspicion, much less probable cause, to suspect that it had been stolen.

Thus, the trial court erred in holding that Officer Rhodes had probable cause to trespass onto private property to search for evidence of a crime.

(ii) Exigent circumstances

The Commonwealth argued that a warrant was not required under the automobile exception to the warrant requirement. (J.A. 115-117). Collins argued that the automobile exception did not apply to the facts of this case because the exception was created to authorize the search in a vehicle that had been stopped on a highway where probable cause existed to believe that contraband would be found in the vehicle. In this case, the vehicle was not stopped on a highway and the officer had no probable cause to believe contraband would be found in the vehicle. He was simply searching for a vehicle. Thus, Collins argued that both probable cause and exigent circumstances were required to justify the officer's trespass onto private property for the purpose of conducting the search. (J.A. at 117-118).

The court agreed that the automobile exception did not apply to the facts of this case because of the distinctions cited by Collins. (J.A. at 119). Nonetheless, the court held that the search was not an unreasonable government intrusion because Officer Rhodes had probable cause to conduct the search. (J.A. at 119-121). The court, however, did not find or even address requirement for or the existence of exigent circumstances. (J.A. 119-121).

In this case, no exigent circumstances existed. None were articulated by Officer Rhodes, none were argued by the Commonwealth and none were cited by the court.

This was not a "hot pursuit" situation because Officer Rhodes was investigating a crime of eluding which had occurred nearly two months prior to the date of his warrantless trespass. There was no risk that evidence would be destroyed because the motorcycle was in plain view and Officer Rhodes had already set up surveillance of the residence to prevent anyone from removing the motorcycle without his knowledge. Nothing about the case or in the testimony suggested that there might be any danger to the police or to others.

Officer Rhodes could easily have complied with the law by knocking on the front door for the purpose of talking to and seeking consent from the residents. Instead of complying with the traditional invitation to "knock and talk," Officer Rhodes trespassed onto the property and removed the tarp which covered the motorcycle. This act exceeded the licence generally accepted for entry onto private property.

Alternatively, he could have sent Officer McCall to the magistrate for a search warrant based on a showing of probable cause to an independent judicial officer. He had already sent Officer McCall on another fact-finding errand to Jarman's Sportcycles. Thus, Officer McCall was not a critical component of the surveillance operation.

Even if some semblance of probable cause existed, there were no exigent circumstances to justify the trespass onto the curtilage of Collins' home. Officer Rhodes' warrantless trespass onto private property to search for evidence without probable cause and exigent circumstances was *per se* unreasonable and a violation of Collins' rights under the Fourth Amendment of the Constitution of the United States.

Thus, the trial court erred in holding that the warrantless intrusion onto private property was reasonable.

d. *Conclusion*

For the foregoing reasons, this court should find that the trial court erred in denying Collins' motion to suppress evidence related to the motorcycle, reverse his conviction and remand the matter back to the circuit court for further proceedings.

II THE COURT OF APPEALS OF VIRGINIA ERRED IN UPHOLDING THE JUDGMENT OF THE TRIAL COURT AND FINDING THAT THE OFFICER ACTED LAWFULLY UNDER THE FOURTH AMENDMENT IN ENTERING THE PROPERTY AND SEARCHING THE MOTORCYCLE.

a. *The Court of Appeals erred in finding that the officer had probable cause to search for the motorcycle on private property.*

Probable cause exists when the facts and circumstances within the officer's knowledge alone are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed. *Commonwealth v. Grimstead,* 12 Va. App. 1066, 1069, 407 S.E.2d 47 (1991). However, suspicion, or even strong reason to suspect is not an adequate substitute for probable cause to justify the entry and search. Id.

The Court of Appeals held that Officer Rhodes "unquestionably had probable cause to believe that the motorcycle was the one from the eluding incident before entering the property." (J.A. 279). If that is all probable cause requires in this case, then Collins must concede the issue. However, the probable cause standard requires more. "The long-prevailing standard of probable cause protects 'citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,' while giving 'fair leeway for enforcing the law in the community's protection.'" *Maryland v. Pringle,* 540 U.S. 366, 370 (2003), quoting *Brinegar v. United States,* 338 U.S. 160, 176 (1949).

In this case, the officer was investigating a crime of eluding which had occurred approximately two months prior to the date of this search. At trial, Collins produced evidence that the charges of eluding were completely unfounded because (a) he was in court and otherwise confined to home electronic incarceration on the date of the first alleged incident involving Officer McCall and (b) he did not even own or possess the motorcycle until about two weeks after the date of the second incident involving Officer Rhodes. And as argued, even after conducting his search, the officer still does not have probable cause the charge Collins with eluding.

The Court of Appeals stated that this argument "confuses probable cause needed to arrest and charge an individual with the probable cause required to conduct the search." (J.A. 279, n.3). The two, however, are not completely inseparable because probable cause to search must be supported by facts to show that the search will yield evidence of the crime under investigation. To prove the crime of eluding, the Commonwealth must prove the identity of the driver and the nature of the driving. The make, model or type of the vehicle involved in the offense of eluding is not relevant to proving the elements of the offense.

Merely ascertaining that the motorcycle here as parked on private property was the same one involved in the eluding incident does not advance his investigation. The motorcycle itself was not evidence of a crime. Moreover, Officer Rhodes articulated no facts to support any reasonable belief that the motorcycle itself might be contraband or that it might contain contraband.

In this case, the officer, without a warrant, trespassed on private property to conduct a search. This act alone was an unreasonable intrusion on Collins' privacy interests and his property rights. Moreover, the crime under investigation was then and remains completely unfounded.

Thus, considering the broad purpose of the probable cause standard, the Court of Appeals erred in holding that the officer had probable cause to enter the property to conduct the search.

b. The Court of Appeals erred in holding that exigent circumstances justified the officer's warrantless entry onto the property and the search of the motorcycle.

The Court of Appeals concluded that the following circumstances created an exigency that justified a warrantless intrusion on the private property to conduct a search: (a) "Officer Rhodes had a reasonable belief that the motorcycle could be removed or destroyed, as a motorcycle is readily movable;" (b) "the motorcycle had successfully eluded the police on two previous occasions and could potentially have done so again;" (c) "appellant had already denied owning or knowing anything about the motorcycle or the residence in the picture;" (d) appellant was aware that law enforcement was investigating incidents involving the motorcycle and ... that he might have an interest in concealing or destroying evidence;" (d) the officer "saw that someone had placed a tarp over the motorcycle, indicating a possible attempt to conceal it." (J.A. 281).

Even conceding those facts, the Court of Appeals erred in concluding that they created an emergency compelling the officer to act immediately.

(i) The automobile exception

When a motor vehicle is lawfully stopped on a highway, the police may search the vehicle without a warrant if they have probable cause to believe there is contraband or other evidence of criminal activity in the vehicle. *Carroll v. United States*, 267 U.S. 132 (1925); *Maryland v. Dyson*, 527 U.S. 465 (1999). This exception may also apply to vehicles which are capable of being used on a highway but are found stationary in a place not regularly used for residential purposes. *California v. Carney*, 471 U.S. 386 (1985).

The logic of the foregoing automobile exception is premised on the assumption that citizens have considerably less expectation of privacy in their automobiles than in their homes because motor vehicles travel on the open road. Officer Rhodes claimed authority for the warrantless search on the grounds that the motorcycle was mobile. But unlike the trailer in *Carney*, the motorcycle in this case was clearly parked at a private residence

The Court of Appeals noted that "United States Supreme Court has suggested that a search of a vehicle on private property required more than mere mobility, as is generally sufficient under the automobile exception." (J.A. 282, n.4). Moreover, *Carroll* and its progeny were decided before *Jones* and *Jardines* both of which add a property rights analysis to the established "reasonable expectation of privacy" analysis

which had heretofore dominated the Court's Fourth Amendment jurisprudence.

Thus, the Court of Appeals correctly did not rely on the automobile exception to justify the warrantless search in this case.

(ii) Exigent circumstances

The U. S. Supreme Court has held that law enforcement officers may make a warrantless entry onto private property to fight a fire and investigate its cause, *Michigan v. Tyler*, 436 U.S. 499, 509 (1978), to prevent the **imminent destruction** of evidence, *Ker v. California*, 374 U.S. 23, 40 (1963) (plurality opinion) (**emphasis added**), or to engage in "'hot pursuit'" of a fleeing suspect, *United States v. Santana*, 427 U.S. 38, 42, 43 (1976). *Brigham City v. Stuart,* 547 U.S. 398, 403 (2006). Warrants are generally required unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment. Id., *quoting Mincey v. Arizona*, 437 U.S. 385, 393-394 (1978).

An exigent circumstance exists to justify a warrantless search where a law enforcement officer has probable cause to believe that it is necessary to prevent destruction of evidence. *Evans v. Commonwealth*, 290 Va. 277, 287, 776 S.E.2d 760 (2015). The proper inquiry focuses on what an objective officer could reasonably believe. Id. If the defendant himself has the power to destroy the evidence, the courts assume that he is likely to avail himself of the opportunity. Id.

In *Evans*, law enforcement officers detected the odor of marijuana emanating from the window of an

apartment and knocked on the door to investigate. 290 Va. at 280-281. After being rebuffed several times by the defendant's mother, the police entered the apartment without a warrant and found contraband. Id. The Supreme Court of Virginia held that the warrantless entry was justified to thwart the objectively reasonable possibility that evidence would be destroyed, discarded, or hidden if they did not take immediate action. Id. at 291.

The opinion in *Evans* drew a strong dissent which noted that probable cause requires facts creating more than a bare suspicion that an exigency existed and concluded that the officers' subjective belief that the occupants would imminently destroy evidence is not supported by the record. Id. at 300-302.

In this case, the facts cited by the Court of Appeals may, at best, give rise to a generalized belief that Collins might attempt to move or further conceal the motorcycle. Thus, without citing *Evans* specifically, the Court of Appeals applied similar logic; namely, that exigent circumstances existed to justify a warrantless search because Collins knew the police were searching for the motorcycle in connection to a crime for which he was the suspect and because he had the motive to conceal it.

However, unlike illegal drugs, the motorcycle was in no imminent danger of being destroyed. Officer Rhodes had set up a surveillance of the residence with the motorcycle in plain view and had already dispatched Officer McCall to collect additional evidence. Had Collins emerged from the residence, removed the tarp and attempted to drive the motorcycle away, Officer Rhodes would have had clear evidence linking Collins

to the motorcycle and could have immediately approached him to further investigate the suspected incident of eluding. Had Collins refused to talk and attempted to drive away, Rhodes could have noted the tag number and developed probable cause to stop him based on a faulty registration. Had Collins attempted to elude the stop, Officer Rhodes would have probable cause to arrest him on a new charge of eluding. None of these possibilities compelled Officer Rhodes to trespass on private property to identify the motorcycle. Thus, even assuming the validity of Rhodes' subjective belief in Collins' motives, Collins did not have the power to destroy, move or hide the motorcycle without Rhodes' knowledge.

However, in finding exigent circumstances, the Court of Appeals relied almost exclusively on *Thims v. Commonwealth*, 218 Va. 85, 235 S.E.2d 443 (1977). This case can easily be distinguished on the facts. In *Thims*, the police officer seized a motor vehicle and during an inventory search found contraband which was introduced into evidence at trial. In that case, the police had probable cause to believe that the vehicle had been purchased by the defendant with a forged check and thus was itself evidence of a crime. The police also had probable cause to believe that contraband from a recent burglary would be found in the trunk of the vehicle. The officer articulated facts about why he thought exigent circumstances existed (possible movement of the vehicle and/or destruction of the contraband in the trunk) and why he did not have time to seek a warrant (fast-paced investigation of a recent crime). The Supreme Court of Virginia found that the seizure of the automobile and the subsequent

search of the trunk were lawful under the exigent circumstances exception to the warrant requirement.

In this case, no reasonable law enforcement officer could claim that, under these facts, the motorcycle was in imminent danger of being destroyed. Indeed, Officer Rhodes made no such claim and the Commonwealth made no such argument either at in the trial court or on appeal.

In conclusion, the Court of Appeals erred because the facts do not objectively support the conclusion that sufficient exigencies existed to justify a warrantless intrusion onto private property.

(iii) Time for a warrant

To determine whether a law enforcement officer faced an emergency that justified acting without a warrant, courts must look to the totality of circumstances. *Missouri v. McNeely,* 569 U.S. _____ 111425 (2013), citing *Brigham City v. Stuart*, 547 U.S. 398 (2006). The exigent circumstances exception to the warrant requirement applies when there is a compelling need to prevent the imminent destruction of important evidence, and there is no time to obtain a warrant. *Missouri v. McNeely,* 569 U.S. _____ 111425 (2013) (Chief Justice Roberts concurring).

In *McNeely,* a law enforcement officer arrested a suspect for driving under the influence of alcohol. After the suspect declined to take a breath test, he was taken to a nearby hospital for blood testing. The Court found that the metabolization of alcohol in the bloodstream and the ensuing loss of evidence are among the factors that must be considered in deciding whether a warrant is required. Id. Nonetheless the Court held that the

natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant. Id.

The concurring opinion by Chief Justice Roberts certainly indicates that whether sufficient time exists to get a warrant is one additional factor in determining whether the exigencies permit warrantless searches.

He stated, "(t)he natural dissipation of alcohol in the bloodstream constitutes not only the imminent but ongoing destruction of critical evidence. That would qualify as an exigent circumstance, except that there may be time to secure a warrant before blood can be drawn. If there is, an officer must seek a warrant. If an officer could reasonably conclude that there is not, the exigent circumstances exception applies by its terms, and the blood may be drawn without a warrant." *Missouri v. McNeely,* 569 U.S. _____ 111425 (2013).

The government bears the burden of showing that a warrant could not have been secured in time. See, *United States v. Davis*, 313 F.3d 1300 (11th Cir. 2002).

In this case, even if the Court were to conclude that the motorcycle was in imminent danger of destruction, the Court must further assess whether the officer had sufficient time to secure a warrant. The answer is self-evident from the facts. Officer Rhodes, like the law enforcement officer in *McNeely*, never testified or claimed that he did not have time to get a warrant, only that he thought he had the authority to search without one. The Commonwealth never argued that the officer did not have time to get a warrant.

And the facts suggest ample time. Officer Rhodes had set up surveillance of the residence and had

already dispatched Officer McCall on another fact-finding mission. Not only could Officer Rhodes have dispatched Officer McCall to the more urgent requirement of securing a search warrant but in today's age with access to cell phones, text messaging, mobile e-mail and two-way radio communications, Officer Rhodes could have initiated the process on his own without abandoning his surveillance position. He not only failed to do so but failed to show why he could not have done so. In short, the Commonwealth has failed to meet this burden of proof.

Moreover, the requirement to prove a time element further demonstrates the inapplicability of *Thims* which was decided before the age of cell phones, text messaging and mobile email integrated with two way radio communications. Such technological advances in the ability of officers on the street to secure timely warrants must be considered in determining whether sufficient exigent circumstances exist to justify a warrantless search.

In conclusion, the Court of Appeals erred because the facts support the conclusion that Officer Rhodes had ample time and the means to secure a warrant without requiring a warrantless trespass onto private property for the purpose of conducting a search.

(iv) Awareness of police presence

Exigent circumstances will not normally exist where the suspects are unaware of the police surveillance or presence. See *United States v. Santa*, 236 F.3d 662 (11th Cir. 2000); *United States v. Davis*, 1270 F. Supp. 2d 1234 (M.D. Fla. 2001); *United States v. Hernandez*, 214 F. Supp. 2d 1344 (S.D. Fla. 2002).

An exigent circumstance exists to justify a warrantless search where a law enforcement officer has probable cause to believe that it is necessary to prevent destruction of evidence. *Evans v. Commonwealth*, 290 Va. 277, 287, 776 S.E.2d 760 (2015). The proper inquiry focuses on what an objective officer could reasonably believe. Id.

In this case, no evidence was introduced to support a finding that Collins was aware of the presence or surveillance law enforcement officers. Nonetheless, the Court of Appeals noted several factors from which Officer Rhodes could have reasoned that Collins knew of the eluding investigation and thus might attempt to move or conceal the motorcycle.

However, Officer Rhodes had already taken the step to secure the premises visually by setting up surveillance of both the motorcycle and the front entry/exit from the premises. Even if Collins had become aware of their presence and attempted to exit from the rear, the motorcycle would have remained in place until such time as a warrant had been authorized. For this additional reason, the Court of Appeals erred to holding that sufficient exigencies existed for officer Rhodes to enter the property and examine the motorcycle.

CONCLUSION

The Appellant, Ryan Austin Collins, respectfully prays that this Honorable Court find that the Court of Appeals erred in upholding the rulings of the trial court, reverse the judgment of the trial court and remand the matter back to the Court of Appeals for further proceedings consistent with this ruling.

2016 WL 9024640 (Va.)

SUPREME COURT OF VIRGINIA

No. 151277

[Filed February 17, 2016]

RYAN AUSTIN COLLINS,	)
	)
Appellant,	)
	)
v.	)
	)
COMMONWEALTH OF VIRGINIA,	)
	)
Appellee.	)

BRIEF FOR THE COMMONWEALTH

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[*Tables Omitted in the Printing of this Appendix*]

STATEMENT OF THE CASE

Ryan Austin Collins was indicted for possession of stolen property by an Albemarle County grand jury on December 2, 2013. (App. 50). On April 30, 2014, the Albemarle County Circuit Court denied Collins's motion to suppress evidence, which challenged a warrantless search of a partially covered motorcycle in his girlfriend's driveway. (App. 118-21, 268). The following week, the trial court, sitting without a jury, convicted Collins of receiving stolen property and sentenced him to three years in prison, with all but two months suspended. The final judgment order was entered on May 20, 2014. (App. 271).

The Court of Appeals of Virginia granted Collins's petition for appeal and then affirmed the ruling of the trial court on July 21, 2015. (App. 274-86). *Collins v. Commonwealth*, 65 Va. App. 37, 773 S.E.2d 618 (2015).[1]

ASSIGNMENT OF ERROR

The trial court erred in denying Collins' motion to suppress the evidence related to the motorcycle because the officer illegally trespassed onto private property for the purpose of conducting a search in violation of his Fourth Amendment right to be free from unreasonable searches and seizures. The Court of Appeals erred in upholding the judgment of the trial court and finding that the officer acted lawfully under the Fourth Amendment in entering the

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[1] The Court of Appeals rejected Collins challenge to the sufficiency of the evidence. Collins did not include that issue in his petition for appeal to this Court.

property and searching the motorcycle. *Collins v. Commonwealth*, 65 Va. App. 37, 46, 773 S.E.2d 618 (2015).

STATEMENT OF FACTS

On July 25, 2013, Officer David Rhodes of the Albemarle County Police Department was on patrol and noticed a motorcycle coming from behind him at a high rate of speed. (App. 65-66, 79). Rhodes activated his radar, which indicated the motorcycle was traveling at 100 mph in a posted 55 mph zone. (App. 79). The motorcycle passed him on his left. Rhodes made eye-contact with the driver, but could not identify him because the driver wore a helmet with a tinted shield. Rhodes activated his emergency equipment and attempted to stop the motorcycle, which he noted was an orange and black Suzuki. (App. 84). The motorcycle "took off at a very high rate of speed [exceeding] 140 mph." (App. 80). Rhodes pursued the motorcycle until it drove onto the interstate. Rhodes then stopped the pursuit because the driver "was driving too reckless." (App. 80).

During the incident, Rhodes's dash camera made a video recording of the incident and he took a screen shot of the motorcycle from that video. He also recorded the "tag number" on his hand during the pursuit. (App. 88-89, 91). Rhodes checked the tag number and it came back not "on file." Further investigation established the tag had been inactive for several years and was last used by an "Eric Jones." (App. 91). Sometime after July 25, 2013, Rhodes's investigation developed Collins as

the likely driver of the motorcycle. (App. 95).[2] Rhodes drove by Collins's residence on Northfields Circle several times after July 25, 2013, but never saw the "orange and black motorcycle" at that residence. (App. 96-97).

On September 10, 2013, while on patrol, Officer Rhodes heard Collins's name on the radio. Other officers were investigating Collins in reference to a vehicle (a silver Acura) he was attempting to register at the DMV. Rhodes went to the DMV to talk with Collins about the motorcycle incident on July 25, 2013. (App. 66, 68, 161, 172-73). Another officer, Matthew McCall, also spoke with Collins at the DMV. McCall was investigating a June 4, 2013 eluding incident involving an orange and black motorcycle with an extended frame. (App. 166).

At the DMV, Officer McCall first advised Collins of his *Miranda* rights and then questioned him about a motorcycle involved in the June 4, 2013 eluding incident. (App. 162, 165-66). Collins responded that he had not owned or driven a motorcycle in months, that it was not him, and also that the last motorcycle he had owned was green. (App. 163-64). While McCall talked to Collins at the DMV, Rhodes looked up Collins's Facebook page and took two pictures with his phone of

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[2] At some point after July 25, 2013, Eric Jones told another officer he had sold the motorcycle to Ryan Collins, and that officer related that information to Rhodes. (App. 95, 203). Jones testified at trial that he sold the motorcycle to Collins for $1800 in April 2013, telling Collins it lacked a title and was "possibly stolen." (App. 140-41, 159). Collins told Jones the lack of title or possibility it might be stolen did not concern him because he intended to turn the motorcycle into a racing bike. (App. 142, 146).

pictures on Collins's Facebook page. (App. 175). Rhodes recognized the motorcycle in the pictures as the one involved in the July 25, 2013 eluding incident. (App. 176).

After McCall finished talking with Collins, Rhodes showed Collins the two photographs he had obtained from Collins's Facebook page. (App. 67). Rhodes wanted to find the motorcycle and use it to help identify who operated it on July 25, 2013, when it eluded him. (App. 97). The first photograph depicted a residence with several vehicles parked in the driveway and one in front of the house on the street. The vehicle parked on the street was "the same Acura" Collins was attempting to register at the DMV. (App. 68-69, 82, 100). The second Facebook photograph showed an orange and black motorcycle parked between a black sedan and a silver Toyota 4-Runner in the driveway at the same residence. (App. 68-69, 124-125). Rhodes asked Collins if he knew where the house was located or where the motorcycle in the photograph was located. Collins told Rhodes that "he didn't know anything about it or where it was located." (App. 78, 175-76, 178). The photographs from the Facebook page shown to Collins depicted the same motorcycle Rhodes had "attempted to stop" on July 25, 2013. (App. 176).

Officer Rhodes testified at the suppression hearing that the motorcycle he had seen on July 25, 2013 had "been stretched out," which meant a rear end had been added onto the motorcycle to make it longer than a "conventional motorcycle," and indicated the motorcycle was a "racing type" used for drag racing. (App. 69). Rhodes also had noted that the motorcycle had chrome wheels and a chrome swing arm "which was somewhat

unique" and noted that you "normally" do not see someone driving down the road on such a motorcycle. It was "customized" and not something that could be bought "from the factory." (App. 69-70). When Officer Rhodes saw the photograph of the motorcycle on Collins's Facebook page, he was "100% sure that that was the same motorcycle that had not stopped for [him] on the bypass based on looking at it. It was very distinctive and [he] knew, absolutely no question in [his] mind that was the same motorcycle." (App. 100).

Shortly after finishing his conversation with Collins, and Collins's departure from the DMV, Officer Rhodes learned through an informant that the house in the Facebook photograph was on Dellmeade Avenue in the City of Charlottesville. (App. 70-71). Within 30 minutes of seeing the Facebook photographs, Rhodes found the house in the photograph at 2304 Dellmeade Avenue, within the City of Charlottesville, about one block from the Albemarle County line. (App. 71-73). While still in his police car, from the street, Rhodes could see the motorcycle in the driveway, which was partially covered with a white tarp. (App. 178-79).

The motorcycle was parked in front of the silver SUV at the same angle and in about the same spot as the motorcycle depicted in the Facebook photographs. (App. 179). The cover did not completely obscure the motorcycle underneath it. Rhodes testified about "a quarter of the wheel was sticking out from underneath the cover and the cover was "sticking up." (App. 90). Rhodes observed that the partially covered motorcycle was much longer than an average motorcycle by its outline under the cover and that "both" wheels were chrome. (*Id.*). Based on the outline and visible chrome

sticking out from underneath the cover, the motorcycle "appeared to be the same motorcycle that [Rhodes] had attempted to stop." (App. 72).

From the sidewalk, Officer Rhodes took a picture of the motorcycle with the tarp on it. (App. 179). Because of the mobile nature of the motorcycle, Officer Rhodes walked up the driveway about one car length and then lifted the cover off of it to obtain the license plate or VIN in his effort to determine who had driven the motorcycle on July 25, 2013. (App. 74, 90). When Rhodes took the cover off, he confirmed that the motorcycle was the same motorcycle he had been looking for since it had eluded him on July 25, 2013. (App. 100). Rhodes was 100% certain it was the same one that had eluded him on July 25th and the same one in the Facebook photos. (App. 180).

Rhodes first ran the tag number on the motorcycle, which was different than the tag number he had seen on it on July 25, 2013. The new tag number, however, was for a different motorcycle, a Kawasaki motorcycle from Waynesboro that had been sold. (App. 74, 180). Rhodes next acquired the VIN number off the motorcycle and checked the VIN, which indicated that the 2008 Suzuki had been "stolen out of New York State." (App. 74, 81, 181).

Officer Rhodes found Collins at the residence on Dellmeade Avenue later on September 10, 2013. (App. 182). Collins was dressed in a long-sleeved shirt and Timberland-style boots, "the same exact boots that the rider was wearing...the day [Rhodes] tried to stop the motorcycle." (*Id.*). Throughout the conversation, Collins's story changed several times. First, Collins stated he did not know anything about the motorcycle

and then he told Rhodes it was a friend's motorcycle. Eventually, however, Collins admitted he had purchased the motorcycle from Eric Jones. (App. 183). Collins told Rhodes the last time he moved the motorcycle was about a week earlier. (App. 183). When confronted with information showing the motorcycle had been serviced at Jarman's Sportcycles, Collins admitted to driving it there to get new tires put on it. (App. 128, 183-84). Collins explained the license plate on the motorcycle had been the plate on another motorcycle he had previously sold. (App. 184).

Collins was then arrested and Rhodes conducted a search incident to that arrest. Rhodes uncovered a key in Collins's pants pocket which fit the motorcycle in the driveway. (App. 185).

According to Collins's girlfriend, Kandace Beach, who moved to 2304 Dellmeade Avenue on August 8, 2013, Collins spent "a couple of nights per week" at that residence and was there the night of September 9-10, 2013. (App. 103-104). She testified that the motorcycle in the Facebook picture introduced into evidence had only been parked in the driveway for approximately one week prior to September 10, 2013. (App. 106, 228). Beach previously had lived intermittently at Collins's mother's home on Northfields Circle, and had spent "a good bit of time" at the Northfields Circle home with Collins. Beach testified at trial, however, that she had never seen the motorcycle at the Northfields address. (App. 226, 228).

Collins's mother, Terri Roberts, who lived on Northfields Circle, testified that the motorcycle from the Facebook photos was parked in front of her home that August. (App. 231-32, 234, 237).

ARGUMENT

THE TRIAL COURT DID NOT ERR IN DENYING COLLINS'S MOTION TO SUPPRESS BECAUSE OFFICER RHODES HAD PROBABLE CAUSE TO BELIEVE THE PARTIALLY COVERED MOTORCYCLE IN THE DRIVEWAY WAS THE SAME MOTORCYCLE INVOVLED IN THE JULY 25, 2013 ELUDING INCIDENT, IT WAS REASONABLE TO BELIEVE THAT SEARCHING IT WOULD PROVIDE INFORMATION LEADING TO THE IDENTITY OF THE RIDER IN THAT INCIDENT, AND THAT THE WARRANTLESS SEARCH WAS SUPPORTED BY EXIGENT CIRCUMSTANCES.

The issue in this case is whether Officer Rhodes's entry onto the driveway and removal of the tarp that partially covered the motorcycle was justified under the Fourth Amendment. Collins, as he did at trial, argues that Rhodes did not have probable cause and there were no exigent circumstances justifying Rhodes's entry onto the driveway and removal of the tarp.

STANDARD OF REVIEW

On appeal, the denial of a motion to suppress presents a mixed question of law and fact that this Court reviews de novo on appeal. *See Branham v. Commonwealth*, 283 Va. 273, 279, 720 S.E.2d 74, 77 (2012) (citations omitted). In that review, this Court views "the evidence in the light most favorable to the Commonwealth [granting] the Commonwealth the benefit of all reasonable inferences fairly deducible from that evidence," and it is the defendant's burden to show "that even when the evidence is reviewed in that

light, denying the motion to suppress was reversible error." *Id.*; *see also Covil v. Commonwealth*, 268 Va. 692, 696, 604 S.E.2d 79, 82 (2004) (false or evasive account is circumstance factfinder may properly consider as evidence of guilty knowledge). In reviewing the denial of the suppression motion, the Court "consider[s] facts presented both at the suppression hearing and at trial." *Testa v. Commonwealth*, 55 Va. App. 275, 279, 685 S.E.2d 213, 215 (2009) (citation omitted); *accord Mason v. Commonwealth*, 64 Va. App. 292, 296, 767 S.E.2d 726, 728 (2015) (en banc), *appeal granted on other grounds*, 2015 Va. LEXIS 152 (Oct. 29, 2015); *see, e.g., Weeks v. Commonwealth*, 248 Va. 460, 466, 450 S.E.2d 379, 383 (1994).

PRIOR RULINGS

In the circuit court, Collins argued that Officer Rhodes lacked probable cause, the automobile exception did not apply, and Rhodes could have obtained a warrant. (App. 117-18). The trial court heard and denied Collins's motion to suppress focusing on whether probable cause existed to believe the partially covered motorcycle in the driveway at 2304 Dellmeade Avenue was the same motorcycle that eluded Rhodes on July 25, 2013. (App. 119). The trial court noted that the picture of the motorcycle (without the tarp) posted on Collins's Facebook page (along with other identifying information such as the house and other vehicles) was "almost identical" to the "unique" motorcycle that eluded Rhodes; Collins's statements to Rhodes at the DMV were deceitful; and the motorcycle was in plain view. The judge went on to note that Rhodes could clearly see the partially covered motorcycle from the sidewalk and credited his

testimony that it matched the description of the "unique" motorcycle he had been looking for, and concluded that Rhodes had probable cause. (App. 120-21).

In the Court of Appeals, Collins argued the same points he raised at trial. The Court of Appeals first found that Officer Rhodes "unquestionably had probable cause to believe" that the partially covered motorcycle in the driveway was the same one that had eluded him on July 25, 2013 and summarized the unique facts Rhodes could see from a public street before he entered the property.

> These include the unusual length of the motorcycle due to it having been "stretched out" for drag racing, which was clearly visible even when under the tarp. In addition, the tarp did not extend to the ground, leaving the customized chrome wheel covers and swingarm uncovered. These are all distinctive features Officer Rhodes recognized from the motorcycle he encountered, and videorecorded, during the eluding incident. Furthermore, Officer Rhodes possessed photos of the same motorcycle before someone covered it with a tarp, parked at a similar angle and in the same location at that residence.

Collins, 65 Va. App. at 44-45, 773 S.E.2d at 622.

The Court of Appeals found it unnecessary to determine if the motorcycle was within the curtilage of the house because the exigencies apparent from the record justified the entry and search (specifically the likely loss/concealment of the item Rhodes sought to search in his effort to identify the driver); and assumed

without deciding it was within the curtilage. *Id.* at 45, 773 S.E.2d at 623. In addition, because the record clearly established exigencies separate and apart from the automobile exception, the Court of Appeals did not reach the issue. *Id.* at 44-48, 773 S.E.2d at 622-24.

In this Court, Collins asserts the officer: could not walk up the driveway; had no probable cause to remove the tarp; had no probable cause to believe that Collins was the driver of the motorcycle on July 25, 2013; and the officer should have watched the motorcycle and obtained a warrant. He also claims that the automobile exception does not apply to a car in a driveway. Collins's arguments overlook well established precedent that allows an officer to: observe items in plain view from a public street; walk up a driveway; and forgo obtaining a warrant even if there is time to obtain one. Collins's position that no exigency, including the automobile exception, applies to a vehicle in a driveway is inconsistent with the exigency precedent of the United States Supreme Court and this Court.

ANALYSIS

Fourth Amendment

An officer with probable cause to believe he will find evidence pertaining to a crime he is investigating by searching a vehicle may search that vehicle if the circumstances support the finding of an exigency. To be sure, as this Court has held, evidence pertaining to a crime includes evidence that may identify the perpetrator of a crime in which the vehicle was used. *See McCary v. Commonwealth*, 228 Va. 219, 226-29, 321 S.E.2d 637, 640-42 (1984) (officer seeking

information from within a vehicle regarding the identity of a bank robber may search said vehicle for that information provided there is probable cause to believe the robber used the vehicle as a getaway car) (citing *United States v. Robinson*, 533 F.2d 578, 583 (D.C. Cir. 1976)).

The United States Supreme Court and this Court have held that the Fourth Amendment generally, *subject to certain exceptions*, requires a police officer to obtain a warrant before conducting a search. *See California v. Carney*, 471 U.S. 386, 39[illegible] (1985) (a warrant issued by an independent judicial officer preserves the fundamental "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" subject to exceptions to that general rule); *McCary*, 228 Va. at 227, 321 S.E.2d at 641 (searches conducted without prior judicial approval are per se unreasonable under the Fourth Amendment, subject to exceptions allowed when exigencies require warrantless searches) (citing *Chambers v. Maroney*, 399 U.S. 42, 51 (1970); *Fore v. Commonwealth*, 220 Va. 1007, 1010, 265 S.E.2d 729, 731 (1980); *Thims v. Commonwealth*, 218 Va. 85, 88-89, 235 S.E.2d 443, 445 (1977)).

Collins's brief contends that Officer Rhodes needed probable cause to charge him with eluding and that a warrant (or warrantless search that falls with an exception) has to be tied to a particular person. (Def. Br. at 16-17). In rejecting Collins's argument, the Court of Appeals noted that his

> argument confuses the probable cause needed to arrest and charge an individual with the probable cause required to conduct a lawful

> search. Officer Rhodes had numerous reasons to believe that the motorcycle was the one involved in the eluding incident and that a search would provide information leading to the individual who committed the crime. Officer Rhodes's decision not to pursue eluding charges against appellant, regardless of the reason, did not vitiate the probable cause he had to search.

65 Va. App. at 45 n.3, 773 S.E.2d at 622 n.3.

The Court of Appeals is correct because warrants are not issued solely to search for a specific item of contraband (such as drugs). Warrants may issue to allow the search or seizure of items that will facilitate identification of suspects; and are routinely directed at third parties (such as communication service providers) who have no connection to a crime, but nevertheless have either evidence related to a crime or evidence that may assist in identifying a suspect. *See Zurcher v. Stanford Daily*, 436 U.S. 547, 555 (1978) ("Search warrants are not directed at persons; they authorize the search of [places] and the seizure of 'things,' and as a constitutional matter they need not even name the person from whom the things will be seized."); *Warden v. Hayden*, 387 U.S. 294, 310 (1967) ("there is no viable reason to distinguish intrusions to secure 'mere evidence' from intrusions to secure fruits, instrumentalities, or contraband");[3] *see also Wyoming*

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[3] Collins reliance on *Hayden* is misplaced. In *Hayden*, even though the specific exigency involved in *Hayden* was different, the case supports the Commonwealth's position that an officer can search for items to aid in identifying a suspect although the items themselves are not contraband. In *Hayden*, the Court held that an

v. Houghton, 526 U.S. 295, 302 (1999) (noting that *United States* v. *Ross*, 456 U.S. 798, 824 (1982), held that the permissible scope of a warrantless car search "is defined by the object of the search and the places in which there is probable cause to believe that it may be found" is the same principle reflected in *Zurcher* "involving the constitutionality of a search warrant directed at premises belonging to one who is not suspected of any crime").

An officer's actions in conducting a warrantless search of a vehicle comply with the Fourth Amendment when he "has probable cause to believe that he will find the instrumentality or ***evidence pertaining to a crime*** before they begin their warrantless search." *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 221 (1968) (emphasis added); *see United States v. Johns*, 469 U.S. 478, 483 (1985) ("exception to the warrant requirement recognized by *Carroll* allows a search of the same scope as could be authorized by a magistrate" and that a "warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search") (citing *Ross*, 456 U.S. at 821, 823, 825). This is so because even if the police suspect a person, but lack probable cause to arrest, "such a person's property may be searched upon probable cause to believe" the evidence sought will be found. *See*

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officer could pursue an armed fleeing robbery suspect into a building and that the search of a closed washing machine for weapons in which the officer found and seized clothes that matched the description of the clothes worn by the robber did not violate the Fourth Amendment. 387 U.S. at 307. The Court concluded that the police could have "reasonably believe[d] that the [clothes] would aid in the identification of the culprit." *Id.*

United States v. Melvin, 596 F.2d 492, 495-96 (1st Cir. 1979); *see also United States v. Glenn*, 908 F.2d 163, 165 (7th Cir. 1990) (no need for a nexus between the owner and the crime under investigation for which evidence is sought; only need probable cause that the evidence sought will found in a particular place). In short, if a warrantless search is justified, the scope of that search is the same "'as could be authorized by a magistrate'" and that would include "a search of every part of the vehicle that might contain the object of the search." *Johns*, 469 U.S. at 483 (citation omitted).

Driveway

In support of his Assignment of Error, Collins argues it is undisputed that Rhodes entered the curtilage of a home. (Def. Br. at 11). His assertion, however, overlooks the standard of review and the fact that the Court of Appeals assumed without deciding, for purposes of the appeal, that Rhodes entered the curtilage for purposes of the appeal because "numerous exigencies justified the search." *Collins*, 65 Va. App. at 46, 773 S.E.2d at 623. Further, the Fourth Amendment does not prohibit an officer, without a warrant, from walking up a driveway "because that is 'no more than any private citizen might do.'" *Florida v. Jardines*, 133 S. Ct. 1409, 1416 (2013); *Robinson v. Commonwealth*, 273 Va. 26, 34, 639 S.E.2d 217, 221-22 (2007) (doctrine of implied consent deems an officer's entry by driveway or sidewalk, an entry into the curtilage, "a reasonable intrusion into an area otherwise protected by an expectation of privacy under the Fourth Amendment")

(citations omitted).[4] Although the record here was not as developed as in *Robinson*, the driveway[5] in the photographs of 2304 Dellmeade Avenue establish beyond genuine dispute that Rhodes's walking on just a portion of the driveway did not violate any interest in privacy.

The picture introduced into evidence clearly shows that the driveway is the customary manner in which people approach this house and that Officer Rhodes did not have to cross any barriers as he walked from the street, across the sidewalk, and then up the driveway toward the partially covered motorcycle, which was in

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[4] The United States Supreme Court also had no issue with officers that "proceeded down the driveway to investigate" a noise complaint. *See Brigham City v. Stuart*, 547 U.S. 398, 401 (2006); *cf. Shaver v. Commonwealth*, 30 Va. App. 789, 793, 797, 520 S.E.2d 389, 395, 397 (1999) (holding appellant had no expectation of privacy when driveway where stolen goods were located was completely visible from the road). The Supreme Court also applied the automobile exception to the warrantless search of a truck in the driveway of a farmhouse. *Pennsylvania v. Labron*, 518 U.S. 938, 939-40 (1996).

[5] Numerous courts have applied the automobile exception to vehicles parked on private driveways. *See United States v. Hines*, 449 F.3d 808, 814-15 (7th Cir. 2006); *United States v. Brookins*, 345 F.3d 231, 234, 238 (4th Cir. 2003); *United States v. Fladten*, 230 F.3d 1083, 1085-86 (8th Cir. 2000) (per curiam); *United States v. Markham*, 844 F.2d 366, 368 (6th Cir. 1988); *United States v. Hamilton*, 792 F.2d 837, 843 (9th Cir. 1986). The Ninth Circuit has also applied the exception to an inoperable vehicle parked in a driveway. *See United States v. Hatley*, 15 F.3d 856, 859 (9th Cir. 1994); *see also Michigan v. Thomas*, 458 U.S. 259, 261 (1982) (justification to conduct warrantless search of a vehicle does not depend on the reviewing court's assessment car would have been driven away).

plain view from the street. As in *Jardines*, where the Fourth Amendment was not implicated until the canine sniffed at the front door, the Fourth Amendment was not implicated here until Rhodes removed the tarp.

Probable Cause

Collins's assertion that Officer Rhodes lacked probable cause is predicated in large part on a misconception of what an officer can search and search for without violating the Fourth Amendment. Collins argues that Rhodes had no reason to suspect that the motorcycle was stolen and no reason to believe that by identifying the motorcycle it would enable Rhodes to identify Collins as the driver. (Def. Br. at 16-17). As noted in this brief previously, and by the Court of Appeals, Collins's position does not recognize that an officer can search an object that may help identify a suspect. *See supra* at 15-18. The record in this case establishes "unquestionably" that Rhodes had probable cause to believe that the partially covered motorcycle in the driveway at 2304 Dellmeade Drive on September 10, 2013 was the same motorcycle that had eluded him on July 25, 2013. *Collins*, 65 Va. App. 45, 774 S.E.2d at 622. Further, it was reasonable for Rhodes to look at information such as the license plate and VIN in an effort to identify the driver of the motorcycle on July 25, 2013.

Probable cause "does not demand any showing that [the officer's] belief be correct or more likely true than false." *Delong v. Commonwealth*, 234 Va. 357, 366, 362 S.E.2d 669, 674 (1987). Probable cause is a "flexible, commonsense standard" that in the totality of the circumstances would warrant a "person of reasonable

caution to believe" that the partially covered motorcycle in the driveway was the same motorcycle that had eluded Officer Rhodes on July 25, 2013 and that the license plate or VIN would assist in identifying the driver. *Id.* (citations omitted); *see Illinois v. Gates*, 462 U.S. 213, 232 (1983) ("probable cause is a fluid concept - turning on the assessment of probabilities in particular factual contexts - not readily, or even usefully, reduced to a neat set of legal rules."); *Taylor v. Commonwealth*, 222 Va. 816, 820, 284 S.E.2d 833, 836 (1981) (when facts and circumstances within an officer's knowledge "alone are sufficient to warrant a person of reasonable caution to believe that" evidence of a crime is present in a vehicle, probable cause exists to search that vehicle under the automobile exception). Police "officers are not required to possess either the gift of prophecy or the infallible wisdom that comes only with hindsight. They must be judged by their reaction to circumstances as they reasonably appeared to trained law enforcement officers to exist when the decision to [search] was made." *Keeter v. Commonwealth*, 222 Va. 134, 141, 278 S.E.2d 841, 846 (1981).

The evidence in this case established probable cause to believe that evidence related to the crime Rhodes was investigating would be found by searching the motorcycle and that the motorcycle Rhodes had been trying to locate was under the tarp. *See Florida v. White*, 526 U.S. 559, 565 (1999) (upholding seizure of a car from a public place where police had probable cause to believe the car was evidence of a crime); *see, e.g., McCary*, 228 Va. at 226-29, 321 S.E.2d at 640-42 (upholding search of vehicle for information regarding identity of bank robber because there was probable

cause to believe the robber used the vehicle as a getaway car); *Thims*, 218 Va. at 91-92, 235 S.E.2d at 447 (upholding entry onto private driveway and opening car door to obtain VIN because there was probable cause to believe car was stolen and contained stolen property).

After the incident, Rhodes developed Collins as a suspect. Having found the motorcycle on Collins's Facebook page, and then having located the address that corresponded with what he had seen on Collins's Facebook page, within thirty minutes of confronting Collins with the Facebook pictures, Rhodes was putting the pieces together. When he observed the partially covered motorcycle, which appeared to be the same vehicle as the one in the Facebook page photograph and the one that had eluded him, Rhodes approached the object to obtain information about its licensure and registration to further his investigation into who had driven it on July 25, 2013. (App. 97-98, 179). The now partially covered motorcycle was parked at nearly the identical angle and in about the same spot in relation to the silver SUV as the motorcycle in the Facebook photograph. It also had the same chrome wheels and extended silhouette as the motorcycle for which Rhodes had been searching.

Given the particular facts and circumstances of this case, Rhodes had probable cause to believe that the covered motorcycle in the driveway at 2304 Dellmeade Avenue was the same motorcycle. *See Ornelas v. United States*, 517 U.S. 690, 699 (1996) (courts should give due weight to the inferences drawn by law enforcement officers based upon their experiences and expertise). In short, it was evidence connected to a

crime and likely to help him identify the rider through information on the motorcycle, such as the VIN number.

Exigent Circumstances

The United States Supreme Court, as well as this Court, has recognized exigent circumstances as an exception to the warrant requirement of the Fourth Amendment. In the present case, the trial court found the partially covered motorcycle was in plain view (App. 120-21), which necessarily implicates exigent circumstances. *See Robinson*, 273 Va. at 40, 639 S.E.2d at 225 (after officers had seen evidence of a crime in plain view, exigent circumstances were required for the officer to proceed without a warrant) (citing *Horton v. California*, 496 U.S. 128, 137 n.7 (1990) ("[N]o amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.'")).

The circumstances deemed exigent include not only plain view, as applied by the trial court, but numerous others including the imminent destruction[6] of evidence. *Kentucky v. King*, 563 U.S. 452, 460 (2011); *Verez v. Commonwealth*, 230 Va. 405, 410-11, 337 S.E.2d 749, 753 (1985) (noting ten justifications for finding exigency).[7] In addition to these instances, two exigent

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[6] *King* noted several examples of possible loss/destruction of evidence when a warrant was not required. 563 U.S. at 460 n.3 (citing *Richards v. Wisconsin*, 520 U.S. 385, 395-96 (1997); *Schmerber v. California*, 384 U.S. 757, 770-71 (1966); *United States v. Banks*, 540 U.S. 31, 37-40 (2003).

[7] There are numerous exceptions to the warrant requirement other than those cited herein. See JAMES WM. MOORE ET AL.,

circumstances (the automobile exception and search incident to arrest) apply "categorically."

We have recognized a limited class of traditional exceptions to the warrant requirement that apply categorically and thus do not require an assessment of whether the policy justifications underlying the exception, which may include exigency-based considerations, are implicated in a particular case. *See, e.g., California v. Acevedo*, 500 U.S. 565, 569-570 (1991) (automobile exception); *United States v. Robinson*, 414 U.S. 218, 224-235 (1973) (searches of a person incident to a lawful arrest). By contrast, the general exigency exception, which asks whether an emergency existed that justified a warrantless search, naturally calls for a case-specific inquiry.

Missouri v. McNeely, 133 S. Ct. 1552, 1559 n. 3 (2013). Whether a police officer was justified in acting without a warrant when an exigency requires a case-specific inquiry is determined under the totality of the circumstances test. *Id.* at 1559 (citations omitted).

We apply this "finely tuned approach" to Fourth Amendment reasonableness in this context because the police action at issue lacks "the traditional justification that...a warrant... provides." Absent that established

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MOORE'S FEDERAL PRACTICE - CRIMINAL PROCEDURE § 641.51 (2016); *see also Evans v. Commonwealth*, ____ Va. ____, ____, 776 S.E.2d 760, 763 (2015) ("No fixed legal definition fully captures the meaning of exigent circumstances. Police officers find themselves in a myriad of situations with varied fact patterns. No court could provide an exhaustive enumeration of factors that would distinguish circumstances that qualify as exigent from those that would not.").

justification, "the fact-specific nature of the reasonableness inquiry," demands that we evaluate each case of alleged exigency based "on its own facts and circumstances."

McNeely, 133 S. Ct. at 1559 (citations omitted). In the present case, as found by the Court of Appeals, there were numerous (self-evident) exigencies apparent from the record.

As noted previously, the Court of Appeals discussed the fact that the motorcycle had twice eluded police and had not been seen for approximately six weeks when Rhodes (who had developed Collins as a suspect) confronted Collins at the DMV. The Court noted Rhodes's concern over the loss of the motorcycle a third time by stating he "had a reasonable belief that the motorcycle could be removed or destroyed, as a motorcycle is readily movable," that Collins "recently had driven the motorcycle," and that "the same motorcycle had successfully eluded the police on two previous occasions, and could potentially have done so again here." 65 Va. App. at 46, 773 S.E.2d at 623.

The court in *Collins*, however, stated "mere mobility is far from the only exigency Officer Rhodes faced." *Id.* "Officer Rhodes had, within the same hour, spoken with [Collins] at the DMV where [Collins] denied owning or knowing anything about the motorcycle or the residence in the picture." *Id.* Rhodes, therefore, knew Collins was aware not only that law enforcement was investigating the motorcycle and where it might be found, but that Collins had an interest "in concealing or destroying evidence" and found the previously uncovered motorcycle was covered less than 30 minutes

after he had found it on Collins's Facebook page. 65 Va. App. at 47, 773 S.E.2d at 623.

> In the brief time between when [Collins] returned to the house and when Officer Rhodes knocked on the door, he had changed his clothing from what he wore at the DMV to jeans, a heavy long sleeve shirt, and work boots similar to those worn during the eluding incident, despite it being over 90 degrees that day. [Collins] even had the key to the motorcycle in his jeans pocket. Although the search took place before [Collins] returned home and changed, these actions further speak to the reasonableness of Officer Rhodes's belief that [Collins] might attempt to relocate the motorcycle. Together, the facts indicate that [Collins] not only possessed an interest in, but also the ability and probable intention to, move the motorcycle out of the reach of law enforcement. *See Thims v. Commonwealth*, 218 Va. 85, 91, 235 S.E.2d 443, 446 (1977) (holding that exigent circumstances existed when law enforcement went onto private property to examine a stolen vehicle, despite the fact that defendant, and the keys to the vehicle, was in police custody). In view of the above, we conclude that sufficient exigencies existed for Officer Rhodes to enter the property and examine the motorcycle.

65 Va. App. at 46-47, 773 S.E.2d at 623. Rhodes faced the loss of evidence that might assist in identifying the driver of the motorcycle on July 25, 2013, yet again, if Rhodes failed to act.

Further, Rhodes was investigating a serious felony offender who had twice eluded police. Indeed, Rhodes had to break off his pursuit of the motorcycle on July 25, 2013 due to the reckless nature in which the motorcycle was being driven (at 140 mph). Va. Code § 46.2-817 (willful and wanton disregard of signal by law enforcement officer that interferes with or endanger the operation of the law-enforcement vehicle or endangers a person is a Class 6 felony). Operating a motorcycle at a speed of 140 mph without question shows a reckless disregard for the life and safety of others.

Nevertheless, despite the unquestionable existence of probable cause and numerous exigencies evident from the record, Collins asserts that the trial court erred because it made no explicit finding of exigent circumstances, only that Officer Rhodes had probable cause. (Def. Br. at 16). In so doing, Collins ignores that "[t]here is no general requirement that trial courts must state for the record the reasons underlying their decisions." *Shannon v. Commonwealth*, 289 Va. 203, 206, 768 S.E.2d 433, 436 (2015)). "In Virginia, a trial court has no common law duty to explain in any detail the reasoning supporting its judgments. Absent a statutory requirement to do so, 'a trial court is not required to give findings of fact and conclusions of law.'" *Fitzgerald v. Commonwealth*, 223 Va. 615, 627, 292 S.E.2d 798, 805 (1982)." *Pilati v. Pilati*, 59 Va. App. 176, 180, 717 S.E.2d 807, 809 (2011).

> Trial judges sometimes refrain from providing a detailed explanation because they think "the reasons self-evident." Others may conclude that, in some cases, saying too much is as detrimental

> as saying too little. The correct balance depends on the unique context of each case, the informative value of an explanation, and the possibility of inflaming an interminable dispute with an overly detailed explanation. With few exceptions, when no specific explanation is given by a trial court, we presume the court followed the governing legal principles, and resolved all factual contests favorable to the prevailing party.

Pilati, 59 Va. App. at 181, 717 S.E.2d at 809 (citations omitted). The issue of "exigency," however, was expressly before the trial court during the motion. (App. 110-18).

Collins's assertion of error in this regard has no merit. *See Starks v. Commonwealth*, 225 Va. 48, 54, 301 S.E.2d 152, 156 (1983) ("[a]bsent clear evidence to the contrary," this Court presumes a "trial judge applied the correct standard to the facts.") (citing *Yarborough v. Commonwealth*, 217 Va. 971, 978, 234 S.E.2d 286, 291 (1977); *see also Yarborough*, 217 Va. at 978, 234 S.E.2d at 291 (appellate courts should not fix upon isolated statements of a trial judge taken out of full context and "use them as a predicate for holding the law has been misapplied").

Collins also relies on two recent cases from the United States Supreme Court (*Florida v. Jardines*, 133 S.Ct. 09 (2013), and *United States v. Jones*, 132 S.Ct. 945 (2012)), implying that one or both cases have somehow negated or altered the exigency exception for entry onto or search of property, regardless of whether the officer had probable cause.

Jones involved placement by law enforcement officers of a GPS device on a car the defendant drove. The Court held that such a trespass to property constituted a search. *Id.* at 949. The Court reasoned that the government's physical occupation of private property "for the purpose of obtaining information" constituted a search. *Id.* Importantly, the *Jones* Court refused to consider the government's alternative argument in that case that the search was reasonable because it had been supported by either reasonable suspicion or probable cause because the government had failed to raise that argument below. *Id.* at 954; *see also* 65 Va. App. at 44 n.1, 773 S.E.2d at 621 n.1.

Jardines involved a police officer walking to the front porch of Jardines's home with a narcotics dog. The Court held that this simple approach to the house did not implicate the Fourth Amendment, but that bringing the dog for purposes of obtaining information beyond the threshold constituted a search because even though the officer was implicitly allowed to approach the house as any private citizen would have been able to, his use of the dog exceeded the scope of that implied consent. 133 S.Ct. at 1415-16.

Further evidence that neither *Jardines* nor *Jones* undermined or abated the exigency exception to warrantless searches is the Court's 2011 re-affirmance that the rule against warrantless searches of a home "is subject to certain reasonable exceptions." *King*, 563 U.S. at 459. Undeniably, *King* noted that even the threshold of a house could be crossed without a warrant if exigent circumstances existed. *Id.* "One well-recognized exception applies when 'the exigencies of the situation' make the needs of law enforcement so

compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." *Id.* at 460 (quoting *Mincey v. Arizona*, 437 U.S. 385, 394 (1978), and citing *Payton* v. *New York*, 445 U.S. 573, 590 (1980)).

Jardines merely noted that the Court had added to the reasonable expectation test established in *Katz v. United States*, 389 U.S. 347 (1967), by announcing a physical intrusion test in *Jones*. 133 S.Ct. at 1417. In sum, neither *Jardines* nor *Jones* limited or nullified the long-standing precedent establishing exceptions to the warrant requirement. That point is well-established in the precedent of this Court.

> When government agents conduct a search or seizure within protected areas of a dwelling without a warrant such actions are presumptively unreasonable, *Payton v. New York*, 445 U.S. 573, 586-87 (1980), and unlawful ***unless they are supported by both probable cause and exigent circumstances***. *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002).

Robinson, 273 Va. at 34, 639 S.E.2d at 221 (emphasis added); *accord Keeter*, 222 Va. At 141, 278 S.E.2d at 846. In addition to the exigency the Court of Appeals found to sustain the trial court's ruling, at least two other recognized exigencies that support the denial of Collins's motion to suppress are apparent from the record.

Automobile Exception

Although mentioned but not applied by the Court of Appeals, 65 Va. App. at 46-47, 773 S.E.2d at 623, the

automobile exception is clearly applicable here.[8] This categorical exigency exception was first recognized nearly 100 years ago in *Carroll v. United States*, 267 U.S. 132, 153 (1925), and has no separate exigency requirement. *Maryland v. Dyson*, 527 U.S. 465, 466 (1999).

We made this clear in *United States v. Ross*, 456 U.S. 798, 809 (1982), when we said that in cases where there was probable cause to search a vehicle "a search is not unreasonable if based on facts that would justify the issuance of a warrant, *even though a warrant has not been actually obtained.*" (Emphasis added). In a case with virtually identical facts to this one (even down to the bag of cocaine in the trunk of the car), *Pennsylvania v. Labron*, 518 U.S. 938 (1996) (per curiam), we repeated that the automobile exception does not have a separate exigency requirement: "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment...permits police to search the vehicle without more." *Id.* at 940. *Dyson*, 527 U.S. at 467.

If there is one fact that this record establishes it is that the 2008 Suzuki motorcycle was "readily mobile." "'If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment...permits police to search the vehicle

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[8] On appeal, a judgment can be affirmed on alternative legal reasoning. *See Director of the Dep't of Corr. v. Kozich*, ____ Va. ____, ____, 779 S.E.2d 555, 563 n.12 (2015) (citing *Alexandria Redevelopment & Hous. Auth. v. Walker*, 290 Va. 150, 156 n.1, 772 S.E.2d 297, 300 n.1 (2015); *Perry v. Commonwealth*, 280 Va. 572, 581-82, 701 S.E.2d 431, 437 (2010).

without more.'" *Id. Dyson* made clear that exigent circumstances are presumed when an operational vehicle is involved. *Id.* at 466-67; *see Labron*, 518 U.S. at 940 (an automobile's inherent mobility is "an exigency sufficient to excuse failure to obtain a search warrant once probable cause to conduct the search is clear").

As noted previously, Collins's argument regarding the alleged significance of the driveway is of no moment or merit. If the magistrate could have issued a warrant to authorize Rhodes to enter the driveway and lift the tarp, then Rhodes's actions did not violate the Fourth Amendment. "'For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.'" *Ross*, 456 U.S. at 807 n. 9 (quoting *Chambers*, 399 U.S. at 52); *see supra* at 15-18.

Plain View Exception

As discussed previously, the trial court denied Collins's motion because the partially covered motorcycle was in plain view and the facts known to the officer formed a reasonable basis upon which to conclude that the motorcycle that had eluded him on July 25, 2013 was the same motorcycle that was partially covered in the driveway on Dellmeade Avenue. "The seizure of property in plain view is presumptively reasonable assuming that there is probable cause to associate the property with criminal activity." *Payton*, 445 U.S. at 587; *see, e.g., United*

States v. Drew, 451 F.2d 230, 233-34 (5th Cir. 1971) (outline of a weapon inside an opaque plastic folder was in plain view and sufficient basis for seizure of and search within the folder); *State v. Parnell*, 960 So.2d 1091, 1099 (La. App. 2007) (outline of weapon in defendant's pocket gave officer probable cause to arrest); *Commonwealth v. Barrett*, 458 N.E.2d 348, 349 (Mass. App. 1984) (observation of a firearm in defendant's pocket gave officer probable cause to believe defendant was carrying a firearm and his action in taking the weapon was justified); *State v. Peck*, 283 S.E.2d 383, 386 (N.C. Ct. App. 1981) (plain view does not require "unobstructed sight," but only as much sight as necessary to give reasonable man belief evidence of criminal activity present); *see also Texas v. Brown*, 460 U.S. 730, 743 (1983) (plurality opinion) (irrelevant that officer could not see through the "opaque fabric of the balloon" because of its distinctive character).

In sum, the trial judge did not err in denying the motion to suppress because Officer Rhodes had probable cause to believe that he would find evidence related to his investigation and exigent circumstances - indeed, several different recognized exigencies existed. The Court of Appeals did not err in affirming the trial court's judgment.

CONCLUSION

For these reasons, the judgment of the Court of Appeals of Virginia and the judgment of the Albemarle Circuit Court should be affirmed.

No. 16-1027

IN THE
Supreme Court of the United States

RYAN AUSTIN COLLINS,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTION PRESENTED

Whether the Fourth Amendment's automobile exception permits a police officer, uninvited and without a warrant, to enter private property, approach a home, and search a vehicle parked a few feet from the house.

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INTRODUCTION

Forty-six years ago, a plurality of this Court thought it "abundantly clear that there is a significant constitutional difference between stopping, seizing, and searching a car on the open highway, and entering private property to seize and search an unoccupied, parked vehicle not then being used for any illegal purpose." *Coolidge v. New Hampshire*, 403 U.S. 443, 463 n.20 (1971). The *Coolidge* plurality was right.

In this case, a police officer—uninvited, and without a warrant—walked up a private residential driveway next to a house. He was searching for evidence of a past crime: a motorcycle that had eluded him in traffic over a month earlier. The officer bypassed the steps to the front porch and entered a parking patio nestled against the house and walled off on three sides. He then approached Petitioner's parked motorcycle, several feet from the side of the house, and removed its cover.

The Supreme Court of Virginia approved these acts under the automobile exception. It held that the motorcycle was readily mobile and the officer had probable cause, so any search could proceed without a warrant, period. Essentially, the court held that the automobile exception trumps Fourth Amendment protections for the home and curtilage.

But searching a vehicle within curtilage, such as in a parking patio, carport, or garage, is not just a search of the *vehicle*. It is also a physical intrusion to gather evidence in the curtilage, where privacy expectations reach their peak. *Florida v. Jardines*,

569 U.S. 1, 11 (2013) (holding that police who brought a drug dog into curtilage had performed a "search" of a home that presumptively required a warrant).

The justifications for warrantless vehicle searches in public places stall out when the vehicle is near the home. First, automobiles are readily mobile, but this Court has consistently rejected warrantless home searches for contraband and human beings who are equally mobile. Second, vehicles may carry reduced expectations of privacy on public roads where they are subject to pervasive regulatory regimes. But those regulations generally do not apply to cars parked at home. And even if they did apply, police still do not get a free pass into protected curtilage in other contexts to search for objects that carry lesser expectations of privacy.

Whatever officers can do in public places, the Fourth Amendment does not permit them to enter parking patios, carports, or garages to search for evidence there. As the *Coolidge* plurality warned, "the word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." 403 U.S. at 461.

This Court should reject the Virginia court's rule allowing warrantless vehicle searches without regard to curtilage. The judgment below should be reversed.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia is reported at 790 S.E.2d 611 (Va. 2016). Pet. App. 1. The decision of the Court of Appeals of Virginia is reported at 773 S.E.2d 618 (Va. Ct. App. 2015). Pet.

App. 32. The Circuit Court of Albemarle County ruled from the bench, as reprinted at Pet. App. 50.

JURISDICTION

The Supreme Court of Virginia entered judgment on September 15, 2016, and denied rehearing on November 22. Pet. App. 26, 111. This Court has jurisdiction under 28 U.S.C. § 1257(a), and granted certiorari on September 28, 2017.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Virginia Code § 18.2–108, upon which Collins was convicted, reads in relevant part:

> A. If any person buys or receives from another person, or aids in concealing, any stolen goods or other thing, knowing the same to have been stolen, he shall be deemed guilty of larceny thereof, and may be proceeded against, although the principal offender is not convicted.

STATEMENT OF THE CASE

Facts. Officers Matthew McCall and David Rhodes of the Albemarle County Police Department were looking for the person who eluded them on a motorcycle in two high-speed incidents. Pet. App. 3. The rider's helmet had obscured his face. Pet. App. 3, 67, 70. For reasons not relevant here, the officers suspected Petitioner, Ryan Collins. Pet. App. 3, 5.

More than a month after the eluding incidents, Officers McCall and Rhodes encountered Collins at the DMV. Pet. App. 5. During their conversation, an officer visited Collins' Facebook page and spotted a picture of a motorcycle parked at a house. That motorcycle looked to the officer like the same one that had eluded him. Collins said he did not know anything about the motorcycle. *Id.*

After leaving the DMV, Officer Rhodes located the house in the photograph on Dellmead Lane. Pet. App. 5–6. Collins' girlfriend (and mother of his child) lived there, as did Collins himself at least several nights each week. Pet. App. 27, 91. The court below thus referred to the Dellmead house as "Collins's residence," which is accurate for Fourth Amendment purposes.[1] Pet. App. 12.

The Dellmead house was a brick rancher. Pet. App. 56–57. Its driveway ran from the street up to the left side of the house. Pet. App. 30, 112 (photograph). The asphalt driveway reached the front threshold of the house, then gave way to a concrete parking patio

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[1] "An overnight guest in a home may claim the protection of the Fourth Amendment." *Minnesota v. Carter*, 525 U.S. 83, 90 (1998).

that extended much of the width of the house. Pet. App. 30, 114 (photograph); JA140 (photograph).

A dark colored car was parked about halfway up the driveway, where a visitor might pass to reach the front door. Pet. App. 112–13 (photographs). Behind that car, a motorcycle sat under an opaque white cover.[2] Pet. App. 6, 112–13. The motorcycle rested on the concrete parking patio, beyond the house's front perimeter and beyond the end of the black asphalt driveway. Pet. App. 30, 112–14. This portion of the property was enclosed on three sides: the home on one side and brick retaining walls on the opposite side and the back. Pet. App. 30, 57, 114 (photograph). The motorcycle was no more than roughly a car's width from the side of the dwelling. Pet. App. 30, 114.

Seeing the motorcycle under a cover, Officer Rhodes walked onto the driveway.[3] Pet. App. 6. He did not have permission to go onto the property—he testified no one was home. Pet. App. 88; JA18. Officer Rhodes walked past the end of the asphalt driveway and onto the partly enclosed parking patio alongside the home. He then lifted and removed the motorcycle cover and obtained the license tag and VIN number. Pet. App. 6.

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[2] The Virginia courts referred to the cover as a "white tarp." Pet. App. 6, 35. The "white tarp" was in fact a motorcycle cover, *see* Pet. App. 114—a product designed to protect an open vehicle from the elements, and in common use by motorcycle owners.

[3] The officer's probable cause to believe that the motorcycle was the one that had eluded him in traffic is not disputed for purposes of this appeal.

After running the VIN number, Officer Rhodes learned the motorcycle was flagged as stolen. Pet. App. 6. Having found valuable evidence, he placed the cover back over the motorcycle, left the property, and "parked on another street." *Id.*; JA18.

Shortly thereafter, Officer Rhodes saw the vehicle in which Collins had left the DMV. JA18–19. Officer Rhodes then returned to Dellmead Lane and knocked at the front door. Collins responded. Pet. App. 6. Collins admitted that he owned the motorcycle. Pet. App. 7–8. Officer Rhodes then arrested Collins for possession of stolen goods. Pet. App. 8.

Proceedings Below. Collins was charged with receiving stolen property with knowledge that it was stolen. Pet. App. 8.

Moving to suppress, Collins challenged Officer Rhodes' trespass onto curtilage as unconstitutional. Pet. App. 8, 97–98. Collins also argued that the automobile exception did not apply to vehicles located on private property. Pet. App. 8, 97–98, 103–04. The Circuit Court of Albemarle County denied the motion to suppress. Pet. App. 10. Collins was later convicted of the charge. *Id.*

Collins appealed. The Court of Appeals of Virginia observed that the Commonwealth "[did] not dispute that Officer Rhodes' actions constituted [Fourth Amendment] searches." Pet. App. 38. The court reasoned that the only question before it was what exceptions (if any) to the Warrants Clause justified Officer Rhodes' warrantless searches. Pet. App. 38.

The Court of Appeals assumed the partly enclosed parking patio where the motorcycle was parked was curtilage. Pet. App. 40–41. The court also reflected in a footnote that the automobile exception might not apply to vehicles on private property. Pet. App. 43. But the court held "Officer Rhodes acted lawfully under the Fourth Amendment in entering the property and searching the motorcycle" due to exigent circumstances. Pet. App. 44. Collins again appealed.

The Supreme Court of Virginia refused to adopt the exigent-circumstances rationale. Pet. App. 12. It noted that "neither the Commonwealth nor the trial court invoked the exigent circumstances exception" below and held that "this case is more appropriately resolved under the automobile exception." Pet. App. 12, 14.

The court thus applied what it called a "simple, bright-line test for the automobile exception." Pet. App. 14. "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment permits police to search the vehicle without more." Pet. App. 14–15 (quoting *Maryland v. Dyson*, 527 U.S. 465, 467 (1999)). Simply applying this rule to the motorcycle and facts of this case, the court held that probable cause existed. Pet. App. 15. Nor was there any real question that the motorcycle was "readily mobile." Accordingly, the court found the warrantless searches lawful. *Id.*

The court then added that the automobile exception applied to the motorcycle even though it was located on private property. Pet. App. 19–20. The court's justification was threefold. First, the U.S. "Supreme Court has never limited the automobile

exception such that it would not apply to vehicles parked on private property." Pet. App. 20. Second, "[o]ur Court has held that there is no reasonable expectation of privacy in a vehicle parked on private property yet exposed to public view." Pet. App. 20. Third, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), and *California v. Carney*, 471 U.S. 386 (1985), "did not distinguish the automobile exception on a public roadway versus on a private driveway." Pet. App. 20. The court then held that the automobile exception applies to a vehicle located on private property. Pet. App. 21–22.

The court concluded that Officer Rhodes' Fourth Amendment searches were "justified" under the automobile exception. Pet. App. 26, 111 (denying rehearing).

SUMMARY OF ARGUMENT

The warrantless search of Collins' motorcycle only a few feet from his home violated the Fourth Amendment. In holding otherwise, the Virginia Supreme Court relied on a "bright-line" rule that the automobile exception trumps the Fourth Amendment protections for the home and curtilage. That was error.

The Fourth Amendment presumptively requires a warrant to search a home. That same principle requires a warrant to search the curtilage, which is "part of the home itself for Fourth Amendment purposes." *Florida v. Jardines*, 569 U.S. 1, 6 (2013).

An officer's entry onto the curtilage to search a vehicle is itself a search of the curtilage that

presumptively requires a warrant. That follows from *Jardines*, which held that an unlicensed physical intrusion onto curtilage to investigate is a search of the home. *Id.* at 9. For similar reasons, searching a vehicle within the curtilage is a search of the home because it violates the reasonable expectations of privacy surrounding the home.

None of this Court's decisions exempt vehicle searches within the curtilage from the warrant requirement. To the contrary, the Court has recognized limits on the automobile exception based on the location of the vehicle. In *Coolidge*, 403 U.S. at 479–80, a majority held that the automobile exception did not justify the search of a vehicle parked in a driveway. *Id.* The plurality also insisted on a "significant constitutional difference" between an open-road vehicle search and the search of an automobile parked at home. *Id.* at 463 n.20. *California v. Carney* also shows that the automobile exception does not apply when a vehicle is subject to the protections of the home, as when a mobile home is positioned in a residential fashion. 471 U.S. at 391–92.

Further, the rationales for the automobile exception do not excuse the warrant requirement within curtilage. First, although automobiles are readily mobile, searches through homes for equally mobile drugs and human beings require warrants. Second, vehicles may carry lesser expectations of privacy on public roads where they are subject to pervasive regulation. They are not pervasively regulated, however, when parked in a driveway, carport, or garage at home. In any event, when the protections of the home and curtilage apply,

police must obtain a warrant to search even for items with reduced or *nonexistent* expectations of privacy (such as illegal drugs). At a time when warrants are available with unprecedented efficiency and exigency doctrine can handle case-by-case emergencies, there is no legitimate law enforcement need for a categorical automobile exception within the home and curtilage.

The officer's search of Collins' motorcycle thus violated the Fourth Amendment. The motorcycle was parked and covered within a few feet of the house, where classic curtilage like a porch or side garden might be. To reach the motorcycle, the officer had to veer off the customary invited path to the front door. He certainly had no customary invitation to strip off the motorcycle's cover to investigate it. The officer also violated Collins' reasonable expectations of privacy in that location.

ARGUMENT

The automobile exception does not authorize a warrantless search of a vehicle within the curtilage of a home.

I. The home and curtilage receive core Fourth Amendment protection.

"[W]hen it comes to the Fourth Amendment, the home is first among equals." *Florida v. Jardines*, 569 U.S. 1, 6 (2013). "At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961).

That core protection traces back to the common law of England, which "has so particular and tender a

regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity." 4 W. Blackstone, *Commentaries on the Laws of England* 223 (1769 ed.). That castle doctrine not only protected property, but stood as a bulwark for all individuals against arbitrary governmental power. "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter." *Miller v. United States*, 357 U.S. 301, 307 (1958) (quoting William Pitt, Earl of Chatham, in a 1763 speech). To effect this protection, the Fourth Amendment bars police from entering homes without a warrant. *Steagald v. United States*, 451 U.S. 204, 211 (1981); *see also Agnello v. United States*, 269 U.S. 20, 33 (1925) (An officer's "[b]elief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant.").

To ensure the protection of the home itself, the Fourth Amendment protects more than just the four walls of a house. It also secures "the area 'immediately surrounding and associated with the home"—known as the curtilage—"as 'part of the home itself for Fourth Amendment purposes.'" *Jardines*, 569 U.S. at 6 (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)). "The curtilage of a dwelling house is a space necessary and convenient, habitually used for family purposes and the carrying on of domestic employment; the yard, garden, or field which is near to and used in connection with the dwelling." *Bare v. Commonwealth*, 94 S.E. 168, 172 (Va. 1917). This area is where "privacy expectations are most

heightened" because it is "intimately linked to the home, both physically and psychologically." *California v. Ciraolo*, 476 U.S. 207, 213 (1986).

The "identity" of home and curtilage "has ancient and durable roots." *Jardines*, 569 U.S. at 6. At common law, the "house protect[ed] and privilege[d] all its branches and appurtenants" within that area, including barns and stables. 4 Blackstone 225; *see also* 1 Matthew Hale, *Historia Placitorum Coronae* 557 (1st Am. ed. 1847) (1736) (protections for the home "doth not only include the dwelling-house, but also the out-houses, that are parcel thereof," such as "barn, stable, [and] cow-houses").

The Fourth Amendment thus dictates that police must obtain a valid search warrant to search within curtilage. "Because the curtilage is part of the home, searches and seizures in the curtilage without a warrant are also presumptively unreasonable." *United States v. Perea-Rey*, 680 F.3d 1179, 1184 (9th Cir. 2012) (holding that officers who "occupied [a] carport" within curtilage but without a warrant violated the Fourth Amendment). *See also Taylor v. United States*, 286 U.S. 1, 5–6 (1932) (holding it "inexcusable" and "unreasonable" for police to search a garage "adjacent to the dwelling" without a warrant); *United States v. Wells*, 648 F.3d 671, 679 (8th Cir. 2011) (observing that "because we treat curtilage as part of the home . . . [the] same rules apply" with regard to warrants); *United States v. Breza*, 308 F.3d 430, 433 (4th Cir. 2002) (noting that the "curtilage of [the] home . . . typically is afforded the most stringent Fourth Amendment protection"); *Daughenbaugh v. City of Tiffin*, 150 F.3d 594, 601 (6th Cir. 1998) ("[W]e conclude that the garage was located

within the curtilage of [the] house. The officers consequently violated [the owner's] constitutional rights by conducting a warrantless search of the garage").

A. Property principles require a warrant for intrusions to search.

To search a vehicle within the curtilage, an officer generally must intrude into the curtilage. That physical intrusion to search itself requires a warrant: "When the Government obtains information by physically intruding on persons, houses, papers, or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred." *Jardines*, 569 U.S. at 5. Without a warrant, such a search is presumptively unreasonable. *See Steagald*, 451 U.S. at 211; *Taylor*, 286 U.S. at 5.

Jardines held that bringing a drug-sniffing dog to the front porch of a home is a search. 569 U.S. at 6. First, the Court recognized that "[t]he officers were gathering information in an area belonging to Jardines and immediately surrounding his house—in the curtilage of the house, which we have held enjoys protection as part of the home itself." *Id.* at 5–6. By setting foot on the curtilage, the officers triggered the "'sacred'" principle that "'no man can set his foot on his neighbour's close without his leave.'" *Id.* at 8 (quoting *Entick v. Carrington*, 2 Wils. K. B. 275, 291, 95 Eng. Rep. 807, 817 (K.B. 1765)).

The remaining question was whether the homeowner "had given his leave (even implicitly) for them to do so." *Id.* at 8. An "implicit license typically permits the visitor to approach the home by the front

path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." *Id.*; *see also id.* at 19 (Alito, J., dissenting) ("Of course, this license has certain spatial and temporal limits. A visitor must stick to the path that is typically used to approach a front door, such as a paved walkway."). But "the background social norms that invite a visitor to the front door do not invite him there to conduct a search." *Id.* at 9.

Jardines thus held that there is no implicit license to "introduc[e] a trained police dog to explore the area around the home in hopes of discovering incriminating evidence." *Id.* "To find a visitor knocking on the door is routine (even if sometimes unwelcome)." *Id.* But spotting that same visitor "marching his bloodhound into the garden" would "inspire most of us to—well, call the police." *Id.*

That same "property-rights baseline" makes it a Fourth Amendment search, requiring a warrant, to "physically intrud[e] on" curtilage to investigate a vehicle. *Id.* at 11.

Visitors are invited to the front door—not to stop at the family car in the driveway "in hopes of discovering incriminating evidence." *Id.* at 9. "There is no customary invitation to do *that*." *Id.* "[T]he very act of hanging a knocker" surely doesn't invite anyone "to rummage through the trunk for narcotics." *Id.* Because there is no implicit license to perform a vehicle search within the curtilage, entering the curtilage for that purpose is itself a search that presumptively requires a warrant. *E.g.*, *State v. Roaden*, 648 N.E.2d 916, 919 (Ohio. Ct. App. 1994) (a

warrantless "initial intrusion onto private property to view the inside of appellant's vehicle was improper").

B. Violating reasonable expectations of privacy requires a warrant.

Examining a vehicle within the curtilage is also a search of the home because it invades reasonable expectations of privacy there. *See Jardines*, 569 U.S. at 12 (Kagan, J., concurring) (citing *Katz v. United States*, 389 U.S. 347, 360 (1967)).

The curtilage enjoys the Fourth Amendment's core privacy protections. "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." *Ciraolo* 476 U.S. at 213. The Fourth Amendment accordingly "prevent[s] police officers from standing in an adjacent space and trawling for evidence with impunity." *Jardines*, 569 U.S. at 13 (Kagan, J., concurring).

An entrance into the curtilage to conduct an investigation—whether canine or vehicular—violates expectations of privacy in a "most intimate and familiar space." *Id.* at 14; *see also State v. Vickers*, 793 S.E.2d 167, 169–70 (Ga. Ct. App. 2016) ("[A] defendant has a reasonable expectation of privacy in a vehicle parked within the curtilage of his home."); *Redwood v. Lierman*, 772 N.E.2d 803, 813 (Ill. Ct. App. 2002) ("By parking a vehicle in the driveway or yard of one's home, one brings the vehicle within the zone of privacy relating to one's home."); *Binder v. Redford Twp. Police Dep't*, 93 F. App'x 701, 703 (6th

Cir. 2004) ("[N]o Supreme Court decision allows warrantless entry into areas of a home or business where the owner has a reasonable expectation of privacy simply because the police are in search of an automobile.").

II. This Court has long recognized that the automobile exception has limits based on the location of the vehicle.

On both property and privacy grounds, an intrusion into the curtilage to perform a search presumptively requires a warrant. None of this Court's decisions exempt such searches from the warrant requirement simply because the ultimate target of the intrusion is an automobile. On the contrary, at least twice this Court has recognized that the *location* of a vehicle may exclude it from the scope of the automobile exception.

First, in *Coolidge v. New Hampshire*, the Court confronted a vehicle parked at home, in a private driveway. 403 U.S. at 447. It held that the warrantless search of that vehicle was unreasonable.

After arresting a murder suspect inside his home, police impounded his car and later searched it. *Id.* New Hampshire argued that the automobile exception permitted the car search. See *id.* at 458–64 (plurality opinion). The Court rejected that argument and excluded the evidence. Justice Stewart wrote the plurality opinion, and Justice Harlan joined part II-D of that opinion to form a majority. *Id.* at 491. That part of *Coolidge* "is a binding precedent." *Horton v. California*, 496 U.S. 128, 136 (1990).

The *Coolidge* dissent—like the Virginia Supreme Court here—argued that the automobile exception fully applied to a vehicle parked "in the driveway of a person's house." 403 U.S. at 525 (White, J., dissenting in part).

The majority rejected that view. Instead, it held that "a search or seizure carried out on a suspect's premises without a warrant is per se unreasonable." *Id.* at 474. That is, the warrant requirement remains in effect for vehicles on residential property: "If the police may, without a warrant, seize and search an unoccupied vehicle parked on the owner's private property, not being used for any illegal purpose, then it is hard to see why they need a warrant to seize and search a suitcase, a trunk, a shopping bag, or any other portable container in a house, garage, or back yard." *Id.* at 480. The majority worried that allowing *any* vehicle search on probable cause alone "would simply . . . read the Fourth Amendment out of the Constitution." *Id.*

The plurality opinion reaffirmed that the automobile exception has limited scope: "the word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Id.* at 461 (Section II-B). *Where* the automobile sat was critical: "it seems abundantly clear that there is a significant constitutional difference between stopping, seizing, and searching a car on the open highway, and entering private property to seize and search an unoccupied, parked vehicle not then being used for any illegal purpose." *Id.* at 463 n.20. Because the police arrested the defendant inside the house, there was no "justified initial intrusion" onto the

driveway where the car sat. *Id.* The automobile exception was "simply irrelevant." *Id.* at 462.

Second, in *California v. Carney*, 471 U.S. 386 (1985), the Court again held that the automobile exception does not apply anywhere a vehicle may be found. *Carney* began by recognizing the two rationales for the automobile exception. First, automobiles are readily movable. *Id.* at 390–91. Second, automobiles carry a lower expectation of privacy because they are subject to "pervasive regulation." *Id.* at 391–92.

The Court then announced that these underlying justifications for the automobile exception "come into play" only "[w]hen a vehicle is being used on the highways, or if it is readily capable of such use *and is found stationary in a place not regularly used for residential purposes*—temporary or otherwise." *Id.* at 392–93 (emphasis added).

The Court applied that rule to the warrantless search of a motor home in a public parking lot. The motor home was readily mobile and licensed to operate on public streets. That alone, however, was not enough. The motor home was also "parked" in a "lot"—it was "stationary in a place not regularly used for residential purposes." *Id.* at 392. The automobile exception thus applied. *Id.* at 392–93.

The implication in *Carney* is that home and curtilage protections would trump the automobile exception if the motor home (unquestionably a vehicle) were located, say, up a private driveway or in an RV park.

III. The rationales for the automobile exception do not support extending it to the curtilage.

The automobile exception is an axe, not a scalpel. The Commonwealth argues that the search in this case was quick and easy and took place during "normal daylight hours." BIO 27. But the automobile exception, when it applies, is *categorical*. There is no "separate exigency requirement," *Dyson*, 527 U.S. at 466, and only probable cause limits the scope of the search. If the automobile exception applies on curtilage, as held below, then the police can search a vehicle there (in driveways, parking patios, carports, or garages) day or night.

And the automobile exception authorizes far more intrusive conduct than removing a motorcycle cover. At a minimum, it ordinarily involves entering the interior of a vehicle and perusing private spaces like the trunk and glove box. But it can go much further. It has justified tearing up a car's upholstery. *United States v. Ross*, 456 U.S. 798, 817–18 (1974) (describing the search in *Carroll v. United States*, 267 U.S. 132 (1925)). Automobile searches can be quite destructive. *See, e.g., United States v. Howard*, 489 F.3d 484, 488, 497 (2d Cir. 2007) (Sotomayor, J.) (approving under the automobile exception a search that involved "tampering" with a vehicle so the driver could not lock it, then breaking a pool cue in the back seat and using it to pry open the glove box); *United States v. Guerrero-Sanchez*, 412 F. App'x 133, 136–37, 141 (10th Cir. 2011) (approving a search that involved removing a fender and windshield cowling, noting that officers had probable cause to "dismantle" the vehicle); *United States v. Strickland*, 902 F.2d 937,

942–43 (11th Cir. 1990) (slashing a spare tire); *United States v. Garcia*, 897 F.2d 1413, 1420 (7th Cir. 1990) ("dismantling [car] doors" by "opening" their panels).

Regardless of whether such warrantless searches make sense by the roadside or in open parking lots, they would be outright dangerous in a private driveway, carport, or garage, particularly at night. Such searches would generate calls to the police, *Jardines*, 569 U.S. at 9, and could invite the use of force in defense of property. A rule allowing such searches would cause trouble more than solve it.

To decide whether the automobile exception applies here, the Court should ask "whether application of th[is] doctrine" to the curtilage "would untether the rule from [its] justifications." *Riley v. California*, 134 S. Ct. 2473, 2485 (2014). The two premises of the automobile exception are inherent mobility and reduced expectations of privacy. Neither of those premises can justify a new exception to the warrant requirement for curtilage searches when a vehicle is involved.

A. Ready mobility does not justify a warrantless search in the home and curtilage.

The original basis for the automobile exception was that automobiles are readily mobile. *See Carney*, 471 U.S. at 390 ("[T]he ready mobility of the automobile justifies a lesser degree of protection.") (citing *Carroll*, 267 U.S. at 153). Within the home and curtilage, however, ready mobility does not excuse the need for a warrant.

Drugs, for example, are "easily removed, hidden, or destroyed." *Vale v. Louisiana*, 399 U.S. 30, 34 (1970). Despite acknowledging the risk of evidence being destroyed, the Court has refused to permit warrantless searches of the home for drugs. Absent true exigent circumstances, there is no mobility-based exception within the home for searches. *Id.* at 35; *see also Chimel v. California*, 395 U.S. 752, 763, 768 (1969) (holding that a post-arrest warrantless search of the home was unreasonable despite the dissent's contention (at 774) that "there must almost always be a strong possibility that confederates of the arrested man will in the meanwhile remove the items for which the police have probable cause to search"); *Riley*, 134 S. Ct. at 2486, 2491 (requiring a warrant for post-arrest searches of cell phones, which contain "many sensitive records previously found in the home," despite threats of evidence destruction).

The same is true when searching for people, who "are inherently mobile." *Steagald*, 451 U.S. at 221. This Court held in *Steagald* that officers must obtain a search warrant before entering a third party's home to execute an arrest warrant. *Id.* at 220–21. Although the ready mobility of human beings may force officers "to return to the magistrate several times as the subject of the arrest warrant moves from place to place," *id.* at 221, an officer's "judicially untested determinations" of probable cause do not justify an entry to search for people or objections in the absence of genuine exigent circumstances. *Id.* at 213; *see also Minnesota v. Olson*, 495 U.S. 91, 100–01 (1990) (a warrantless entry to arrest an overnight guest without exigent circumstances violated his Fourth Amendment rights).

The home and curtilage may contain a great many other items that are "equally movable" compared to automobiles. *Coolidge*, 403 U.S. at 461 n.18 (plurality). But "if the police may, without a warrant, seize and search an unoccupied vehicle parked on the owner's private property, not being used for any illegal purpose, then it is hard to see why they need a warrant to seize and search a suitcase, a trunk, a shopping bag, or any other portable container in a house, garage, or back yard." *Id.* at 480 (opinion of the Court). The logic of that rule would give the authorities unmediated access to personal belongings containing a "wealth of detail about [our] familial, political, professional, religious, and sexual associations." *Riley*, 134 S. Ct. at 2490.

B. Pervasive regulation does not diminish reasonable expectations of privacy in the home and curtilage.

The automobile exception also rests on reduced expectations in privacy because "'[a]utomobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls.'" *Carney*, 471 U.S. at 392 (quoting *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976)). That pervasive regulation reduces privacy expectations because "[a]s an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order." *Opperman*, 428 U.S. at 368. This rationale does not apply to vehicles parked in garages or on private driveways.

First, automobiles parked on private driveways generally are not subject to the pervasive regulations that apply on public roads. In Virginia, for example, a panoply of regulations apply specifically to automobiles "operated" on "highways."[4] "Highway[s]" means streets and roads "open to the use of the public for purposes of vehicular travel." Va. Code § 46.2–100. By definition, these regulations do not govern within private garages or on private driveways. In fact, the Virginia Code governing vehicle regulation specifically recognizes greater privacy interests on private property. It states that officers may only "patrol the landowner's property to enforce state, county, city, or town motor vehicle registration and licensing requirements" with *"the consent of the landowner."* Va. Code § 46.2–102 (emphasis added).

Many vehicle regulations in other states are likewise limited to vehicles operated on public roads. That includes headlight requirements,[5] exhaust

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[4] *See* Va. Code § 46.2–711(E) ("No vehicles shall be *operated on the highways* in the Commonwealth without displaying the license plates required by this chapter"); *id.* at –1157(A) (The owner of a vehicle "registered in Virginia and *operated or parked on a highway* within the Commonwealth shall submit his vehicle to an inspection"); *id.* at –1049 (forbidding the "*operation of [a] vehicle on a highway* unless it is equipped with an exhaust system in good working order and in constant operation to prevent excessive or unusual levels of noise"); *id.* at –1011 ("Every motor vehicle . . . *used on a highway* shall be equipped with at least two headlights") (emphases added).

[5] *E.g.*, Ariz. Rev. Stat. Ann. § 28-922 ("[A] vehicle *on a highway* in this state shall display lighted lamps and illuminating devices as required by this article.") (emphasis added); Haw. Rev. Stat. Ann. § 291-25(a); Iowa Code Ann. § 321.384(1); Md. Code Ann., Transp. § 22-201.1; Miss. Code. Ann. § 63-7-11; Neb. Rev. Stat. Ann. § 60-6,219(1); Nev. Rev. Stat. Ann. § 484D.100; N.M. Stat.

regulations,[6] license plate rules,[7] inspection mandates,[8] and other vehicle safety laws.[9] *Cf. Opperman*, 428 U.S. at 368. Because states do not

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Ann. § 66-3-802; 75 Pa. C.S.A. § 4303(a); 31 R.I. Gen. Laws Ann. § 31-24-1(a); S.C. Code Ann. § 56-5-4450; Wash. Rev. Code Ann. § 46.37.020; W. Va. Code Ann. § 17C-15-2; Wyo. Stat. Ann. § 31-5-910.

[6] *E.g.*, 625 Ill. Comp. Stat. Ann. 5/12-602 ("Every motor vehicle driven or operated *upon the highways of this State* shall at all times be equipped with an adequate muffler or exhaust system.") (emphasis added); Colo. Rev. Stat. Ann. § 42-4-225(1); Del. Code Ann. tit. 21, § 4311(a); N.C. Gen. Stat. Ann. § 20-128(a); Or. Rev. Stat. Ann. § 815.250(1); Tenn. Code Ann. § 55-9-202(a); Wis. Stat. Ann. § 347.39(1).

[7] *E.g.*, Conn. Gen. Stat. Ann. § 14-18 ("Each motor vehicle for which one number plate has been issued shall, while in use or operation *upon any public highway*, display in a conspicuous place at the rear of such vehicle the number plate.") (emphasis added); Ala. Code § 32-6-51; Minn. Stat. Ann. § 169.79(1); Mo. Ann. Stat. § 301.130; N.H. Rev. Stat. Ann. § 261:75(II); N.J. Stat. Ann. § 39:3-33; N.Y. Veh. & Traf. Law § 402(1)(a); N.D. Cent. Code Ann. § 39-04-11; S.D. Codified Laws § 32-5-98; Tex. Transp. Code Ann. § 504.943 ; Vt. Stat. Ann. tit 23, § 511(a).

[8] *E.g.*, Utah Code Ann. § 53-8-205 ("[A] person may not operate *on a highway* a motor vehicle required to be registered in this state unless the motor vehicle has passed a safety inspection if required in the current year.") (emphasis added); N.C. Gen. Stat. Ann. § 20-183.8(a)(1); N.Y. Veh. & Traf. Law § 306(b).

[9] *E.g.*, Fla. Stat. Ann. § 316.610 ("It is a violation of this chapter for any person to drive or move, or for the owner or his or her duly authorized representative to cause or knowingly permit to be driven or moved, *on any highway* any vehicle or combination of vehicles which is in such unsafe condition as to endanger any person or property, or . . . which is equipped in any manner in violation of this chapter.") (emphasis added); Ark. Code. Ann. § 27-37-101; La. Stat. Ann. § 32:53(a)(1); Mont. Code Ann. § 61-9-109(1)(c).

pervasively regulate vehicles parked within curtilage as they may on public roads, those vehicles do not suffer a reduced expectation of privacy.[10]

Second, regardless of regulation, when an object is within the curtilage, the heightened expectations of privacy for the home and curtilage remain intact. This is true for illegal drugs, for other contraband, and should be true for vehicles as well.

For instance, illegal drugs carry not just *reduced* expectations of privacy but *no* reasonable expectation of privacy at all. *See, e.g., United States v. Jacobsen*, 466 U.S. 109 (1984). But police cannot search homes or curtilage for illegal drugs without a warrant. *Horton*, 496 U.S. at 137 n.7 ("[E]ven where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure."). That is, even if illegal drugs are certainly present in the home, the protections of the home apply and require a warrant. *See Taylor*, 286 U.S. at 5 (throwing out a search of a

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[10] Earlier cases suggested that an automobile had diminished expectations of privacy because it "travels public thoroughfares where both its occupants and its contents are in plain view." *Opperman*, 428 U.S. at 368; *id.* (noting the "obviously public nature of automobile travel"). But in *Carney*, the Court conclusively rejected that suggestion: "These reduced expectations of privacy derive not from the fact that the area to be searched is in plain view," but rather from pervasive vehicle regulation. 471 U.S. at 392; *accord Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996). Anyway, automobiles parked within the curtilage are *not* "travel[ing] public thoroughfares"; they are stationed where the Fourth Amendment's privacy protections reach their peak.

detached garage that yielded 122 cases of bootleg whiskey for lack of a warrant).

What is clearly true for pure contraband should be at least equally true for vehicles, which are after all still protected "effects" as "that term is used in the [Fourth] Amendment." *United States v. Jones*, 565 U.S. 400, 404 (2012).

Knotts and *Karo* illustrate how expectations of privacy in the home control over any reduced expectation of privacy in vehicles. Because "[a] person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements," *United States v. Knotts* held that police did not need a warrant to track a car to a cabin using a beeper hidden in the car's cargo. 460 U.S. 276, 281–82 (1983). Significantly, the record in *Knotts* did "not reveal that the beeper was used after the location in the area of the cabin had been initially determined." *Id.* at 278–79.

In *United States v. Karo*, however, police continued monitoring the beeper after the car parked at a home. 468 U.S. 705 (1984). By using "an electronic device to obtain information that it could not have obtained by observation from outside the curtilage," the police violated the expectation that our homes enjoy "privacy free of governmental intrusion not authorized by a warrant." *Id.* at 714–15.

As in *Karo*, police must respect the expectations of privacy of the home when a vehicle is within the curtilage. There is "no reason for deviating from the general rule that a search of a house should be conducted pursuant to a warrant." *Id.* at 718. In

short, "vehicles, like any other item or location within the curtilage of a residence, are not to be searched without a warrant, consent, or exigent circumstances." *Vickers*, 793 S.E.2d at 171.

C. Warrants and exigency cover legitimate needs for searches in curtilage.

In considering the proper scope of the automobile exception, a relevant factor is "the degree to which it is needed for the promotion of legitimate governmental interests." *Riley*, 134 S. Ct. at 2484. Here, hardly any such need exists.

The classic application of the automobile exception involves a police officer, often alone, standing in flashing blue lights by the side of the highway. Probable cause to search a car can develop quickly. Waiting for a warrant is not practical, and may invite either escape or trouble in a situation that already involves "inordinate risk" to officer safety. *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977).

But at a house—even a vehicle parked at a house—the scene is different. The owner of the vehicle is not likely in it, and may not be home at all (as in this case). A stationary address gives police options—surveillance over a period of time (as in this case), an opportunity to knock-and-talk, perhaps obtaining consent, or the chance to make plans to engage the vehicle when it returns to the street. Further, police commonly obtain warrants to search in and around people's homes.

Today, police can obtain a warrant more efficiently than at any time in history. *Missouri v. McNeely*, 569

U.S. 141, 154–55 (2013) (recognizing that modern technology and procedures "allow for the more expeditious processing of warrant applications" so that "police officers [can] secure warrants more quickly, and do so without undermining the neutral magistrate judge's essential role as a check on police discretion"). A majority of states "allow police officers . . . to apply for search warrants remotely through various means, including telephonic or radio communication [and] . . . e-mail." *Id.* at 154; *Riley*, 134 S. Ct. at 2493 (an e-mail warrant can be obtained in less than 15 minutes).

When there is *actually* no time for a warrant, exigency doctrine should solve the problem. "Exigent circumstances doctrine is adequate to accommodate legitimate law enforcement needs." *Steagald*, 451 U.S. at 222; *see also McNeely*, 569 U.S. at 165 (rejecting a categorical exception to the warrant requirement for blood tests in drunk-driving cases); *Riley*, 134 S. Ct. at 2487 (rejecting a categorical exception to the warrant requirement for cell-phone searches because the exigency doctrine is a "targeted way[]" to address concerns). After all, at least several states and the Fifth Circuit already "require that there be exigent circumstances justifying a search" when "a vehicle is parked in the defendant's residential driveway." *United States v. Beene*, 818 F.3d 157, 164 (5th Cir. 2016).

Put differently, police already may search vehicles in the curtilage without a warrant in the event of exigency. There is no reason to lay the broader, categorical automobile exception on top of these rules.

For instance, in *Scher v. United States*, 305 U.S. 251 (1938), the police searched a car in a garage. The Commonwealth argues that *Scher* supports applying the automobile exception on curtilage. BIO 16. In fact, the opposite—*Scher* shows that the automobile exception is unnecessary.

In *Scher*, officers with probable cause to stop a car for bootlegging chased the car into the driver's garage. 305 U.S. at 253. The driver then stepped out of the car and made incriminating statements. *Id.* The Court held that the search of the vehicle "accompanied an arrest, without objection and on admission of probable guilt." *Id.* at 255.

Scher rested on the lawfulness of a search incident to arrest. The government urged that the search was lawful as incident to an arrest. Brief for United States, *Scher v. United States*, No. 49, 1938 WL 63934 at *14. And the Court's holding that the searching officers "did nothing either unreasonable or oppressive" relied on two cases regarding "the admissibility of evidence seized during a search incident to a lawful arrest." *Coolidge*, 403 U.S. at 459 n.17 (plurality).

Hot pursuit principles also justified *Scher*'s holding. "Passage of the car into the open garage closely followed by the observing officer did not destroy" the uncontested right to stop and search that existed only seconds before. *Scher*, 305 U.S. at 255; Brief for United States, *Scher*, 1938 WL 63934, at *24 (A car "which is being trailed can[not] secure immunity by being driven into a private garage."). Given all this, the automobile exception in *Scher*, even if present, would be doing no work.

Extending the automobile exception to vehicles parked in the curtilage of homes would change nothing about hot pursuits, urgent human safety issues, or any other exigency that would allow an officer to search a vehicle. Instead, it would swallow those case-by-case exigencies into a categorical automobile exception. It would destroy the "clear distinction between a search of a car that the police had pursued onto private property and one that was long unoccupied and parked in a driveway for a period of time." *United States v. Moscatiello*, 771 F.2d 589, 600 (1st Cir. 1985), *vacated on other grounds sub nom. Rooney v. United States*, 476 U.S. 1138 (1986). Extending the automobile exception thus would do work *only* in cases where there is no exigency—and by definition, no urgent need to search before obtaining a warrant.

Indeed, a savvy police officer could take advantage of such a rule by delaying a warrantless vehicle search *until* it has entered the curtilage—up a driveway, under a carport, or inside of a garage. By timing the search correctly, the automobile exception would become a bootstrap for a free warrantless peek within the sanctity of the home. That incentive would flip the Fourth Amendment on its head.

IV. The automobile exception cannot justify the search of Mr. Collins' covered motorcycle.

The Supreme Court of Virginia's "simple, bright-line test for the automobile exception," Pet. App. 14, holds that that the automobile exception applies to vehicles *wherever* they sit. That rule entirely misses the constitutional significance of the home and

curtilage. This Court should hold that warrantless intrusions into the curtilage cannot be cured by the automobile exception.

Applying that rule to the facts here shows that Officer Rhodes violated Collins' Fourth Amendment rights. The automobile exception does not apply.

A. The motorcycle was in the curtilage.

Collins' motorcycle was within the area "immediately surrounding and associated with the home" and so "part of the home itself for Fourth Amendment purposes." *Oliver*, 466 U.S. at 180; *Kyllo v. United States*, 533 U.S. 27, 33 (2001) ("an area immediately adjacent to a private home" is curtilage).

"The motorcycle was parked within feet of the side of a house in a residential suburban neighborhood and as immediately surrounding the home as possible without being inside it." Pet. App. 30 n.4 (Mims, J., dissenting). The motorcycle stood on a concrete parking patio, beyond the end of the asphalt driveway. Pet. App. 113. Parked inside the home's front perimeter wall, it sat beyond where any visitor heading for the front steps would go. Pet. App. 114. Brick walls, all higher than the motorcycle, surround the parking patio on three sides. *Id.* The motorcycle sat no more than roughly a car's width away from the side wall of the dwelling, near a side door. *Id.; see also* Pet. App. 30 n.4. These facts—shown by photographs in the record—demonstrate curtilage.

Moreover, in *Jardines* this Court identified the "porch," the "side garden" and the area "just outside the front window" as obviously curtilage. 569 U.S. at

6. Here, the concrete parking patio is the equivalent of a "side garden": it is protected on three sides from public view, nestled against the side of the house. The area also sits "just outside" of a side door to the house. Pet. App. 114. Given the undisputed layout of this area, the curtilage is "easily understood from our daily experience," *Oliver*, 466 U.S. at 180, to extend at least across the parking patio to the brick retaining wall within which the motorcycle sat.[11]

Indeed, the distance from the motorcycle to the house—no more than roughly a car's width away—makes this an easy case for finding curtilage. *See* BIO 34 (conceding that "the motorcycle's location in the driveway was . . . close to the house itself"). That explains why the Commonwealth never argued below that the motorcycle was parked beyond the curtilage, despite Collins' repeated insistence that curtilage was undisputed. *See* Collins Opening Brief to the Virginia Court of Appeals, JA157 (asserting that it was "uncontested" that "Officer Rhodes entered into the curtilage of a home"); Collins Opening Brief to the Supreme Court of Virginia, JA205 (same). Only in this Court has the Commonwealth begun to deny that the motorcycle sat within the curtilage. BIO 34.

That argument is waived. The government "may lose its right to raise factual issues" such as extent-of-curtilage questions "before this Court when it has . . . failed to raise such questions in a timely fashion

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[11] At common law, the curtilage extended well beyond the porch and other areas a few yards from the home. It was "sometimes said to reach as far as an English longbow shot—some 200 yards—from the dwelling house." *United States v. Carloss*, 818 F.3d 988, 1005 n.1 (10th Cir. 2016) (Gorsuch, J., dissenting) (citing 1 Hale, *Historia Placitorum Coronae* 559).

during the litigation." *Steagald*, 451 U.S. at 209. Here, the Commonwealth's strategic decision not to offer any argument that the motorcycle was off-curtilage achieved a bright-line rule from the Virginia Supreme Court that made curtilage status irrelevant. The Commonwealth cannot now back away from this.

In any event, *United States v. Dunn*, 480 U.S. 294 (1987) does not illuminate the curtilage question here. *Dunn* analyzed four factors to confirm that a barn on a 200-acre ranch, separated from the house by 60 feet and a fence, was outside the curtilage. *Id.* at 297, 302–03 (evaluating proximity to the house, any enclosures surrounding the home, the uses for the area, and steps taken to shield observation). But *Dunn* itself recognized that those factors do not control "all extent-of-curtilage questions"; they are "useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home's umbrella of Fourth Amendment protection." 480 U.S. at 301.

This Court bypassed those factors in *Jardines* because they were unnecessary. Areas within a car's width from the house are curtilage without needing a *Dunn* test. 569 U.S. at 6. The partly enclosed parking patio here—like the front porch in *Jardines*—is curtilage without the need for an analysis appropriate for distant fields and outbuildings scattered across hundreds of acres.

Indeed, the same *Dunn* arguments the Commonwealth makes here would also cut against those classic exemplars of curtilage. Front porches

often are "not within an enclosure that also surround[s] the home," need not be used for private domestic purposes, and frequently have "no fence or gate . . . to shield activities . . . from travelers passing by." BIO 34.

If the little sunken parking patio here is unprotected open field, as the Commonwealth suggests, then the privacy of Collins' (or anyone's) home would be illusory. Police could "trawl for evidence with impunity" at the outer wall of the house. *Jardines*, 569 U.S. at 6. An officer could "observe [Collins'] repose from just outside" the glass side door overlooking the parking patio. *Id.*; Pet. App. 114. He could even haul a pair of "super-high-powered binoculars" to "stan[d] on the porch and us[e] the binoculars to peer through [the door], into [the] home's furthest corners." *Id.* at 12 (Kagan, J., concurring). All of this, he could do without a warrant or probable cause. Because it is "easily understood from our daily experience," *Oliver*, 466 U.S. at 182 n.12, that such observation from within the shadow of the home would violate reasonable privacy, that area must be curtilage.

The record is more than sufficient for this Court to conclude that the motorcycle was parked in the curtilage. In *Jardines*, for example, no lower court had made a curtilage determination. *See, e.g.*, *Jardines v. State*, 73 So.3d 34, 58 (Fla. 2011) (Lewis, J., specially concurring) (refraining from "discuss[ing] and debat[ing] the concept and extent of curtilage" because "[a]llowing a dog to sniff the air and odors that escape from within a home under a door is tantamount to physical entry into that home."). Yet this Court had "no doubt" based on "our daily

experience" that the front porch was curtilage. 569 U.S. at 7. The same is true of the partly enclosed sunken parking patio here.

B. No implied license authorized the officer's acts.

No implied license authorized Officer Rhodes to stand in the sunken parking patio where he searched the motorcycle. Nor was there any license to remove its cover. Officer Rhodes did not approach the front door. Instead, he snooped into a parking patio immediately next to the home, looking for evidence of a traffic crime that occurred over a month earlier.

The customary invitation into the curtilage only "permits the visitor to approach the home by the front path." *Jardines*, 569 U.S. at 8. To reach the motorcycle, however, Officer Rhodes could not "stay on the base-path" to the front door. *Id.* at 9 n.3. The path to the front door required a visitor to turn right at the steps leading up to the front porch. But the sunken parking patio where the motorcycle sat was entirely beyond the bottom of those steps. Pet. App. 112, 114. So, to reach the motorcycle, Officer Rhodes had to continue beyond the steps on the right, enter the parking patio, and walk left to the motorcycle. That area was not impliedly open to visitors. *Jardines*, 569 U.S. at 8.

Yet even if Officer Rhodes had a license to stand next to the motorcycle, he had no implied permission to remove its cover. *See id.* at 9 ("The scope of a license . . . is limited not only to a particular area but also to a specific purpose."). The implied license invites a visitor *to the front door*—to "knock promptly" and

"wait briefly to be received." *Id.* at 8. But visitors do not stop in the yard to investigate whatever personal property is present—"[t]here is no customary invitation to do *that*." *Id.* at 9.

And there is certainly no customary invitation to strip the protective cover from a vehicle. That is itself a common law trespass that violates the "privacy expectations inherent in items of property that people possess or control," just like the attachment of a tracker to a vehicle. *Jones*, 565 U.S. at 414 (Sotomayor, J., concurring). It is a trespass even if the police aim merely to check a serial number. *See Arizona v. Hicks*, 480 U.S. 321, 324–25 (1987). Even more than nosy neighbors walking metal detectors along the front path or marching their bloodhounds into a garden, stripping a cover from someone else's motorcycle suggests a crime is about to occur. That "would inspire most of us to—well, call the police." *Jardines*, 569 U.S. at 9; *id.* at 20 (Alito, J., dissenting) (disapproving intrusions that "could be a cause for great alarm").

C. The intrusion also violated reasonable expectations of privacy.

For similar reasons, "looking to [Collins'] privacy interests" also makes this "easy cas[e] easy." *Id.* at 13, 16 (Kagan, J., concurring). Considering the motorcycle's location, "[i]t is not surprising that . . . property concepts and privacy concepts should so align." *Id.* at 13.

Courts have recognized that an expectation of privacy over vehicles on curtilage is reasonable. *See, e.g., Vickers*, 793 S.E.2d at 169–70 ("[A] defendant has

a reasonable expectation of privacy in a vehicle parked within the curtilage of his home."); *Redwood*, 772 N.E.2d at 813 ("By parking a vehicle in the driveway or yard of one's home, one brings the vehicle within the zone of privacy relating to one's home.").

Officer Rhodes' intrusion into the curtilage threatened "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Jardines*, 569 U.S. at 13. After all, this happened in a location where Virginia's pervasive regulation of vehicles operated on highways does not apply. To the extent that Officer Rhodes sought to learn the license status of the motorcycle, his entry arguably *violated* statutory Virginia law, which requires permission from the landowner before police may patrol private property for violations of the vehicle code. Va. Code § 46.2-102.

Officer Rhodes invaded a space where "privacy expectations are most heightened." *Jardines*, 569 U.S. at 13. He then trespassed upon Collins' motorcycle cover, and exposed what had been private. A cover over a motorcycle parked next to a house serves much like a garage—it protects an open vehicle from the weather and from passersby, and makes stealing it more difficult.

That the motorcycle later proved stolen does not change this analysis. A "search prosecuted in violation of the Constitution is not made lawful by what it brings to light." *Byars v. United States*, 273 U.S. 28, 29 (1927); *Warden v. Hayden*, 387 U.S. 294, 305–06 (1967) ("[W]e have given recognition to the interest in privacy despite the complete absence of a property claim by suppressing the very items which at

common law could be seized with impunity: stolen goods.").

Collins surely had a proper privacy interest in the home where he often lived with his girlfriend and daughter. Even if there is "no legitimate expectation of privacy in stolen property, as such," the search into the partly enclosed parking patio and under the cover of the motorcycle "actually interfered with . . . *a place* as to which he had a reasonable expectation of privacy." 6 LaFave, Search & Seizure § 11.3(f) (5th ed.); Tr. of Oral Argument, *Florida v. Jardines*, No. 11-564, Tr. 25:14–16 (Justice Kennedy: "What you're saying is, oh, well, if there is contraband in the house, then you have no legitimate expectation of privacy. That, for me, does not work.").

Nor does *New York v. Class* defeat Collins' reasonable expectation of privacy. *Class* held that "a police officer may reach into the passenger compartment of a vehicle to move papers obscuring the VIN after its driver has been stopped for a traffic violation." 475 U.S. 106, 107 (1986). That decision established "the scope of police authority pursuant to a traffic violation stop" for "an automobile driven upon public roads." *Id.* at 114–15.

Class does not rubber-stamp intrusions onto private property to inspect VINs on parked vehicles. That VINs are "required by law to be located in a place ordinarily in plain view from the exterior of an automobile," *id.* at 114, does not alter the plain view principles that first require that "the officer be lawfully located in a place from which the object can be plainly seen." *Horton*, 496 U.S. at 137. *Class* does not apply to vehicles parked on curtilage.

Relying on *Class* to justify Officer Rhodes' search would carry extraordinary implications. The Commonwealth does not dispute that its position would authorize warrantless intrusions into garages or carports to remove protective covers and rummage through vehicles—as long as it's not the "dead of night." BIO 26–27. If *Class* governs, however, police seeking VIN numbers would not even need probable cause to trespass and reach into or strip covers from vehicles in protected places. Any position that would authorize that sort of warrantless, suspicionless entry into the home and curtilage is profoundly at odds with the Fourth Amendment.

CONCLUSION

For these reasons, the judgment of the Virginia Supreme Court should be reversed.

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In The
Supreme Court of the United States

RYAN AUSTIN COLLINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Virginia

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QUESTION PRESENTED

Whether the Fourth Amendment allows a warrantless daytime inspection of a motorcycle's vehicle identification number and license plate, when the motorcycle is parked in a private driveway, clearly identifiable under a tarp, adjacent to the steps leading to the front door of the house, and when the officer has probable cause to believe that the motorcycle is evidence of multiple crimes and twice has been used to elude police.

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IN THE
SUPREME COURT OF THE UNITED STATES

RYAN AUSTIN COLLINS, PETITIONER,

v.

COMMONWEALTH OF VIRGINIA, RESPONDENT.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

BRIEF FOR RESPONDENT

INTRODUCTION

As this Court observed nearly a century ago in *Carroll v. United States*, 267 U.S. 132 (1925), a vehicle's inherent mobility poses unique challenges for law enforcement officers searching for evidence of a crime. A vehicle "can be quickly moved out of the locality or jurisdiction in which the warrant must be sought"—making it "not practicable to secure a warrant" before conducting a search. *Id.* at 153. As a result, "practically since the beginning of the Government" the protections of the Fourth Amendment have been understood in light of the "necessary difference" between the search of a vehicle and the search of a "dwelling house" or similar "structure." *Id.* Accordingly, in *Carroll* this Court recognized a categorical exception to the warrant requirement in cases involving vehicle searches: if an

officer has probable cause to believe that a vehicle contains contraband or evidence of a crime, a warrantless search of the vehicle is "valid." *Id.* at 149.

From the start, the Court regarded its categorical exception as "a wise one" because it is "easily applied and understood and is uniform." *Id.* at 159. And although the Court has since held that the categorical rule has multiple justifications—the ready mobility of automobiles as well as individuals' reduced expectations of privacy in them, *see South Dakota v. Opperman*, 428 U.S. 364, 367 (1976)—the rule itself has remained constant. It is as easy to understand and apply today as when first adopted:

> If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more.
>
> *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (per curiam).

The Supreme Court of Virginia properly applied that rule here, when it upheld a police officer's warrantless search of Collins's motorcycle—discovered parked in a driveway and with ready access to the street—that the officer had undisputed probable cause to believe had been used to commit multiple felonies and that had twice escaped pursuing police officers by taking off at dangerously fast speeds. The officer's daytime search of the motorcycle was brief, unintrusive, and limited in scope. He walked a car length or two into the driveway to access the motorcycle, lifted up its

cover and—after recording the license-plate number and Vehicle Identification Number (VIN) on the motorcycle's exterior and determining that the motorcycle was stolen—replaced the cover. He did only what a warrant would have permitted him to do. And because of the automobile exception, he was authorized to do it before the vehicle could be moved and elude police once again.

The Fourth Amendment permitted the officer to make that reasonable search, regardless of whether the patch of driveway under the motorcycle was inside or outside the home's curtilage. In *Scher v. United States*, 305 U.S. 251 (1938), this Court long ago recognized that the automobile exception applies inside the curtilage. And the Court has never said otherwise—perhaps because the justifications for the exception remain just as valid inside the curtilage as outside it. As the facts of this case well demonstrate, Collins's proposed "true exigent circumstances" test for automobile searches inside the curtilage, *see* Br. for Pet'r at 21, ignores the unique, categorical exigencies posed by vehicles. Such a test would be inconsistent with this Court's Fourth Amendment case law. It would trade the "wise" rule announced in *Carroll*, "which is easily applied and understood and is uniform," 267 U.S. at 159, for one that is inadequate and unworkable.

The Court should affirm.

STATEMENT OF THE CASE

1. On July 25, 2013, Officer David Rhodes was driving on the highway in his unmarked police cruiser when an orange-and-black Suzuki motorcycle approached from behind "at a very high rate of speed." Pet. App. 66. Rhodes activated his rear radar and clocked the motorcycle at 100 mph in a posted 55-mph zone. Pet. App. 67, 69-70. As Rhodes turned on his emergency lights, the motorcycle flew by him and sped away.[1] Pet. App. 67. Rhodes initiated pursuit but gave up the chase when it became too dangerous, with the motorcycle reaching speeds exceeding 140 mph. Pet. App. 66-67, 70-71.

Rhodes managed to jot down the motorcycle's license-plate number and his dash camera recorded images of it. Pet. App. 71, 79. A still photograph of the motorcycle taken by the dash camera was later admitted into evidence. *See* Pet. App. 71-72, 79, 116 (photograph).

The orange-and-black motorcycle was "very unique." Pet. App. 86; *see also* Pet. App. 57. It had a "'stretched out' rear wheel, indicating that it had been modified for drag racing." Pet. App. 3; *see also* Pet. App. 34, 57. It also had chrome accents and chrome wheels. Pet. App. 34, 57. Rhodes explained that "it didn't look

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[1] Willfully and wantonly disregarding a signal from a law enforcement officer in a manner that interferes with or endangers the operation of the law enforcement vehicle or endangers a person was and is a Class 6 felony in Virginia. Va. Code Ann. § 46.2-817(B) (2017).

like a conventional motorcycle." Pet. App. 57. It was "[n]ot something you'd normally see driving down the roadway and not something you can buy from the factory either. So that's a customized type motorcycle." Pet. App. 57-58.

The license-plate number led Rhodes to Eric Jones, who revealed that he had sold the motorcycle to Collins. Pet. App. 78-81; *see also* JA 57-58. Jones admitted that he knew the motorcycle lacked a title certificate and was stolen. JA 52-53. Jones also told Rhodes that he had informed Collins that the motorcycle was stolen.[2] Officer Rhodes drove by the house where he believed Collins lived with his mother, but Rhodes did not find Collins there, nor did he find the motorcycle. Pet. App. 83-84; JA 25.

On September 10, 2013, however, Officer Rhodes received a break in the case; he heard Collins's name mentioned on his police radio in connection with an incident at a branch of the Department of Motor Vehicles. Pet. App. 54. When Rhodes arrived at the DMV, Collins already was being interrogated by Officer McCall, who was investigating Collins as a suspect in a different motorcycle-eluding incident that had occurred on June 4, 2013; that incident had also involved an orange-and-black motorcycle with an extended frame. Pet. App. 72-73; JA 67, 89-90. Collins denied to both officers that he

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[2] At trial, Jones was not sure if he had told Collins that the motorcycle was stolen, something he assumed was evident from the lack of title. But Jones testified that he told Officer Rhodes that he had informed Collins that the motorcycle was stolen. *See* JA 57-58.

owned a motorcycle and denied that he had been involved in any eluding. Pet. App. 58, 73-74.

As Officer McCall questioned Collins, Officer Rhodes was able to gain access, through another officer, to Collins's Facebook page, where Collins had posted several incriminating pictures. Pet. App. 74-75. The photographs (*see* Pet. App. 112-13) depicted a brick home with a driveway on the left side and a "clearly visible" orange-and-black motorcycle—resembling the one that had eluded Rhodes—parked in the driveway between two other vehicles. *See* Pet. App. 56-57. As soon as he saw the Facebook photograph of the motorcycle, Rhodes was "100% sure" it was the same one that had eluded him. Pet. App. 87.

Officer Rhodes used his smartphone to photograph the Facebook pictures and then returned to Collins to question him about them. Pet. App. 54-55, 74. Collins denied knowing anything about the motorcycle or the house in the photographs; he claimed he had not ridden a motorcycle in a few months. Pet. App. 59; JA 76-77. Collins then left the DMV; Rhodes saw him get into a car with a male driver and a female passenger. JA 18-19.

Around this time, Officer Rhodes received a tip that Collins had taken a motorcycle very recently to a shop to have new tires installed. Pet. App. 62. Rhodes asked Officer McCall to investigate that lead. *Id.*

Rhodes also learned from an informant that the house in Collins's Facebook pictures was on Dellmead Lane. Pet. App. 58. Rhodes drove there and quickly

located the property in the photographs. Pet. App. 58-60. Unbeknown to Rhodes, Collins's girlfriend lived at the house on Dellmead Lane; Collins did not live at the house, but he stayed there several nights a week. Pet. App. 89-91.

When Rhodes arrived at the Dellmead property, he observed a motorcycle, partially covered in a white tarp, parked in the driveway, "plainly" visible from the street.[3] Pet. App. 60. No one appeared to be home. JA 18. The covered motorcycle had the same silhouette as the stretched-out motorcycle Rhodes was looking for, and he could also see a chrome wheel that was not fully covered by the tarp. Pet. App. 60; Pet. App. 77. From the sidewalk, Rhodes took a photograph (*see* Pet. App. 114) of the covered motorcycle. Pet. App. 60-61; JA 80. The motorcycle was "a car length or two" into the driveway. Pet. App. 77. It was parked against a retaining wall, on the left side of the driveway away from the house, near the steps leading from the driveway to the front door. *See* Pet. App. 114. The motorcycle was in the "exact same location" and "exact same position" depicted in the Facebook photographs. Pet. App. 106-07. *Compare* Pet. App. 113, *with* Pet. App. 114.

After photographing the vehicle from the sidewalk, Officer Rhodes walked up the driveway and pulled back the tarp to read the license plate and VIN on the motorcycle's exterior. JA 80. His visual

[3] Collins believes that it was a "motorcycle cover," rather than a "tarp," covering the motorcycle, *see* Br. for Pet'r at 5 n.2, but, consistent with the courts below, this brief refers to it as a tarp.

inspection confirmed that the motorcycle was the same one that had been used to escape him on July 25. JA 81; *see also* Pet. App. 87. Rhodes then ran the VIN and learned that the motorcycle had been stolen in New York. Pet. App. 68. The license plate had been changed from what he had seen on July 25; the new tag was registered to a Kawasaki motorcycle, not the Suzuki. Pet. App. 62. Rhodes then photographed the uncovered motorcycle, *see* Pet. App. 115, and replaced the tarp, Pet. App. 89.

Next, Rhodes returned to his vehicle to surveil the property, anticipating Collins's imminent arrival. JA 18. A short time later, a car drove by that Rhodes recognized as the same car that Collins had gotten into when he left the DMV, but Collins no longer was in it. JA 18-19.

Rhodes walked up the driveway and knocked on the front door of the home; Collins appeared at the door. Pet. App. 64. Collins had changed out of the shorts and flip-flops he had been wearing at the DMV less than an hour earlier. Pet. App. 64-65. Now he was dressed in motorcycle-appropriate attire. Despite that the temperature outside exceeded 90 degrees, Collins had donned jeans, a long-sleeved shirt, and Timberland-type boots, "the same exact boots that the rider was wearing" on July 25. JA 83; *see also* Pet. App. 65, 67.

Collins agreed to speak with Rhodes. He initially claimed to know nothing about the motorcycle; then he said it belonged to a friend. Pet. App. 64-65. As Rhodes

questioned Collins, Officer McCall arrived back from investigating the lead at the shop; he had obtained an invoice showing that Collins had purchased new tires for the motorcycle eight days earlier. Pet. App. 63-64; JA 45-46. Collins then admitted that he had ridden the motorcycle from his mother's house to the shop to have new tires put on. Pet. App. 65. Eventually, upon further questioning, Collins admitted that he had purchased the motorcycle from Jones. Pet. App. 68. Officer Rhodes then placed Collins under arrest for receiving stolen property. Pet. App. 65-66. In a search incident to arrest, Rhodes found the key to the motorcycle in Collins's pocket. Pet. App. 66.

2. The trial court overruled Collins's motion to suppress the evidence of the license plate and VIN that Rhodes had obtained by looking under the tarp. Pet. App. 107. Collins went to trial, was convicted of receiving stolen property,[4] and was sentenced to three years in prison with all but two months suspended (time already served). JA 143-45.

Collins appealed the trial court's decision denying his suppression motion, and the Virginia Court of Appeals affirmed. Pet. App. 32-33. The Court of Appeals found the record insufficient to determine whether the covered motorcycle had been parked within the curtilage of the home. Pet. App. 41. Even assuming it was

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[4] *See* Va. Code Ann. § 18.2-108(A) (2014) ("If any person buys or receives from another person, or aids in concealing, any stolen goods or other thing, knowing the same to have been stolen, he shall be deemed guilty of larceny thereof, and may be proceeded against, although the principal offender is not convicted.").

within the curtilage, though, the court found that "numerous exigencies justified both [Rhodes's] entry onto the property and his moving the tarp to view the motorcycle and record its identification number." *Id.* In particular, a reasonable officer could believe that the motorcycle could easily be moved, particularly in light of the prior eluding episodes. Pet. App. 41-42. Moreover, Rhodes knew that Collins was aware that he was being investigated and that the police had Collins's own photographs showing the orange-and-black motorcycle parked in the driveway. Pet. App. 42. And when Rhodes located the house, there was a "tarp over the motorcycle, indicating a possible attempt to conceal it." *Id.* Accordingly, the court found the search lawful and held that it "need not rely on the automobile exception, for exigencies existed aside from the inherent mobility of the motorcycle." Pet. App. 44 n.4.

The Supreme Court of Virginia affirmed, but on a different ground. It noted that "the facts necessary to resolve this case under the automobile exception to the warrant requirement of the Fourth Amendment were established in the record before the trial court." Pet. App. 26. Noting that this Court "has never limited the automobile exception such that it would not apply to vehicles parked on private property," Pet. App. 20, and that "there is no reasonable expectation of privacy in a vehicle parked on private property yet exposed to public view," *id.*, the court concluded that "Officer Rhodes'[s] search of the motorcycle was justified." Pet. App. 26.

One justice dissented. He concluded that Officer Rhodes needed a warrant before looking under the tarp. Pet. App. 30-31 (Mims, J., dissenting). Like the majority, the dissent did "not address the question of whether the part of the driveway where the motorcycle was parked . . . was curtilage or open field for Fourth Amendment purposes." Pet. App. 30 n.4. That did not matter because, in the dissent's view, "[s]earching the tarp without a warrant was unconstitutional even if the area where the motorcycle was parked is considered to be open field." *Id.*

Collins filed a timely petition for a writ of certiorari, which this Court granted on September 28, 2017.

SUMMARY OF ARGUMENT

Under the well-established and long-recognized automobile exception, "[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more." *Labron*, 518 U.S. at 940.

The Supreme Court of Virginia faithfully applied that categorical rule here, finding no Fourth Amendment violation in Officer Rhodes's warrantless search of the exterior of Collins's motorcycle to read the license-plate number and VIN. Every court below found, and Collins now concedes, that Rhodes had probable cause to believe that the motorcycle was evidence of a crime. Rhodes knew that the motorcycle had been used to elude police, escaping at speeds exceeding 140 mph.

Collins also cannot dispute that Officer Rhodes, having finally found the motorcycle, could not know when the motorcycle would disappear again. Officer Rhodes did know, however, that Collins had just been alerted that police could locate the motorcycle soon and that Collins would have a strong motive to move it.

Collins's sole argument is that the categorical automobile exception does not apply because of where the motorcycle was parked on the driveway—a car length or two from the street but, Collins contends, within the curtilage of the home. Thus, Collins concludes, Officer Rhodes was precluded from acting based on the probable cause that he had developed before the search. Collins claims that Rhodes should have waited to search the motorcycle until after he had secured a warrant based on that probable cause.

But this Court has never limited the application of the automobile exception to particular locations, and this case does not demand a departure from the categorical rule. Indeed, these facts illustrate well the justifications for the automobile exception, and why the Court should decline Collins's invitation to abandon the exception in favor of a case-by-case exigent-circumstances test. Collins's heavy reliance on the Court's analyses in *United States v. Jones*, 565 U.S. 400 (2012), and *Florida v. Jardines*, 569 U.S. 1 (2013)—addressing only what constitutes a "search" under the Fourth Amendment—is misplaced. The Commonwealth concedes that Officer Rhodes searched the motorcycle, so *Jones* and *Jardines* add little to the analysis. Moreover, as Collins correctly concedes, Officer Rhodes had

"probable cause to believe that the motorcycle was the one that had eluded him in traffic," Br. for Pet'r at 5 n.3, and Rhodes formed that reasonable belief before he ever stepped foot onto the driveway.

Collins's fear that applying the automobile exception in this case would allow police officers to "trawl for evidence with impunity," Br. for Pet'r at 34, is unwarranted. "Automobile or no automobile, there must be probable cause for the search." *Almeida-Sanchez v. United States*, 413 U.S. 266, 269 (1973). And the Fourth Amendment still requires that the search be reasonable. The permissible "scope of a warrantless search based on probable cause," even under the automobile exception, is further limited by the nature of the probable cause justifying the search. *United States v. Ross*, 456 U.S. 798, 823 (1982). It "is no narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause." *Id.* at 823. The minimal search conducted by Officer Rhodes did not exceed that scope here.

Collins's proposal to eliminate the automobile exception's applicability to any vehicles parked in the curtilage is unsupported by precedent and inconsistent with the Court's reasons for creating the exception in the first place. Given the reasons for the rule, it would be better to draw the line at the threshold of the home or any other enclosed physical structure inside the home's curtilage. That boundary comports with Fourth

Amendment principles and fully accounts for the considerations that justify the automobile exception.

The Court should affirm, but if it decides that the outcome does turn on whether the motorcycle was inside the curtilage, it should remand for resolution of that question.

ARGUMENT

I. The automobile exception to the warrant requirement applies here.

A. The automobile exception is categorical and applies in cases where, as here, a vehicle is readily mobile and probable cause exists to believe that a search will uncover evidence of a crime.

The central requirement of the Fourth Amendment is that a search must be reasonable. *See, e.g.*, *United States v. Knights*, 534 U.S. 112, 118 (2001) (noting that the "touchstone of the Fourth Amendment is reasonableness"). Although this Court has held that the Fourth Amendment "generally requires police to secure a warrant before conducting a search," *Maryland v. Dyson*, 527 U.S. 465, 466 (1999) (per curiam), "[w]hen faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable," *Illinois v. McArthur*, 531 U.S. 326, 330 (2001); *see also* Akhil Reed Amar, *Fourth*

Amendment First Principles, 107 Harv. L. Rev. 757, 801 (1994) ("The core of the Fourth Amendment, as we have seen, is neither a warrant nor probable cause, but reasonableness."). To that end, the Court has recognized a number of "flexible, common-sense exceptions to this [warrant] requirement." *Texas v. Brown*, 460 U.S. 730, 735 (1983) (plurality opinion) (collecting cases).

One longstanding exception is the "automobile exception," which is simply stated: "[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more." *Labron*, 518 U.S. at 940; *see also McArthur*, 531 U.S. at 330 (citing *Labron* and identifying the "search of [an] automobile supported by probable cause" as one set of circumstances that "render[s] a warrantless search or seizure reasonable"). As Collins rightly concedes, "the automobile exception, when it applies, is *categorical*." Br. for Pet'r at 19.

1. Multiple rationales justify the automobile exception.

First recognized in *Carroll* in 1925, the automobile exception is one of the oldest exceptions to the warrant requirement. As the Court explained there, its origins date as far back as the Fourth Amendment itself, to a time when early Congresses had distinguished "as to the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house

or similar place, and like goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant." 267 U.S. at 151. Thus, the Court perceived "a necessary difference between a search" for contraband goods contained inside a building—such as a "store, dwelling house or other structure," for "which a proper official warrant readily may be obtained"—and "a search of a ship, motor boat, wagon or automobile, . . . where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Id.* at 153.

On the basis of this "reason and authority," the Court in *Carroll* set forth what it called the "true rule":

> [I]f the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid.
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> *Id.* at 149.

"[R]eady mobility alone was perhaps the original justification for the vehicle exception," *California v. Carney*, 471 U.S. 386, 391 (1985), but cases after *Carroll* established a "further justification," *Labron*, 518 U.S. at 940. In addition to mobility, "less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is

significantly less than that relating to one's home or office." *Opperman*, 428 U.S. at 367.

> One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view.
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> *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion).

As the Court noted in *Carney*, "even when enclosed 'repository' areas have been involved," the Court has "concluded that the lesser expectations of privacy warrant application of the exception." 471 U.S. at 391. Automobiles also are "subjected to police stop and examination to enforce 'pervasive' governmental controls 'as an everyday occurrence,' . . . and, finally, are exposed to traffic accidents that may render all their contents open to public scrutiny." *Wyoming v. Houghton*, 526 U.S. 295, 303 (1999) (quoting *Opperman*, 428 U.S. at 368). "The public is fully aware that it is accorded less privacy in its automobiles because of this compelling governmental need for regulation." *Carney*, 471 U.S. at 392.

Although the justifications for the automobile exception have multiplied, what has not changed is its categorical application. The Court has emphasized that point from the start, explaining in *Carroll* that its rule was not only "in keeping with the requirements of

the Fourth Amendment and the principles of search and seizure of contraband forfeitable property," it was also "a wise one because" of its straightforward application. *Id.* at 159. "[I]t leaves the rule one which is easily applied and understood and is uniform." *Id.*; *see also California v. Acevedo*, 500 U.S. 565, 580 (1991) ("We therefore interpret *Carroll* as providing one rule to govern all automobile searches."); *Ross*, 456 U.S. at 807 n.9 ("The rules as applied in particular cases may appear unsatisfactory. They reflect, however, a reasoned application of the more general rule . . . .").

Nearly a century later, having been applied countless times, the rule remains clear: "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more." *Labron*, 518 U.S. at 940. As shown below, those criteria were clearly satisfied here, and the rule was properly applied.

2. The automobile exception permitted the search here because Officer Rhodes had ample probable cause, before entering the property, to believe that Collins's readily mobile motorcycle was evidence of a crime.

Collins rightly concedes that Officer Rhodes had probable cause to believe that the motorcycle parked on his girlfriend's driveway was an instrumentality of the crime of eluding. Br. for Pet'r at 5 n.3. The Supreme Court of Virginia additionally concluded that Rhodes

had probable cause, based on his investigatory conversations with Eric Jones, to believe that the motorcycle was contraband connected to the crime of receiving stolen property. Pet. App. 15; *see also Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 221 (1968) (stating that the automobile exception applies when "the officers conducting the search have 'reasonable or probable cause' to believe that they will find the instrumentality of a crime or evidence pertaining to a crime"); *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 310 (1967) ("The Fourth Amendment allows intrusions upon privacy under these circumstances, and there is no viable reason to distinguish intrusions to secure 'mere evidence' from intrusions to secure fruits, instrumentalities, or contraband.").

Collins's concession is appropriate. Given "the events which occurred leading up to" the search of the motorcycle, it was clear that the "historical facts, viewed from the standpoint of an objectively reasonable police officer, amount[ed] . . . to probable cause." *Ornelas v. United States*, 517 U.S. 690, 696 (1996). When Rhodes saw the motorcycle in the photograph on Collins's Facebook page, he was "100% sure" it was the one used to elude him. Pet. App. 87. And when he then located the residence depicted in the photograph, with the motorcycle still parked in the driveway, Rhodes recognized the motorcycle's unusual configuration and one of its chrome wheels. Although it was partially covered with a tarp, it was parked in the same position as the tarpless motorcycle in the photograph and had its

distinctive silhouette.[5] Pet. App. 60, 77. And just minutes earlier, Collins had cinched the probable-cause determination by implausibly denying that he knew anything about the house and the motorcycle in the photograph, despite that the photograph was posted on his Facebook page. Pet. App. 58; JA 76-77.

Collins concedes the existence of probable cause, but he fails to appreciate its significance to the analysis. That Officer Rhodes possessed probable cause before he walked up the driveway distinguishes the two cases on which Collins principally relies. They assess only the validity of warrantless searches conducted *without* probable cause.

United States v. Jones addressed only whether a search occurred when officers attached a tracking device to a suspected criminal's vehicle and monitored its movements for four weeks. The Court found that to be a search. 565 U.S. at 404. Although the government argued in the alternative that any search was justified

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[5] Collins does not distinguish between a search *of* the motorcycle and a search *for* the motorcycle, *see* Pet. App. 27 (Mims, J., dissenting), and it is clear that the tarp did not prevent the formation of probable cause, *see id.* (acknowledging that the "shape and contours of the object were visible through the tarp and suggested [w]hat the object it covered was"). Indeed, "[t]he fact that [Rhodes] could not see through the opaque fabric of the [tarp] is all but irrelevant: the distinctive character of the [tarp] itself spoke volumes as to its contents—particularly to the trained eye of the officer." *Brown*, 460 U.S. at 74 (plurality opinion); *see also Ross*, 456 U.S. at 814 n.19 ("[S]ome containers . . . by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance.") (citation and punctuation omitted).

by reasonable suspicion or probable cause, the Court held that the argument had been forfeited and chose not to address it. *Id.* at 413. Similarly, in *Florida v. Jardines*, the Court held that officers' use of a drug-sniffing dog on a homeowner's front porch to investigate the contents of the home constituted a search. 569 U.S. at 11-12. There too, the Court only addressed whether a search had occurred, not whether the Florida Supreme Court had correctly concluded that the officers lacked probable cause to conduct a search. *Id.* at 5.

Unlike in *Jones* and *Jardines*, there is no dispute in this appeal that a search occurred. It did. Contrary to Collins's suggestion, *see* Br. for Pet'r at 35-36, no one is arguing that a visitor—be it a Girl Scout, a trick-or-treater, or a police officer—is "impliedly invited," *Jardines*, 569 U.S. at 9 & n.4, to remove the cover off a vehicle parked in a private driveway and to inspect its license-plate and VIN information.[6] But neither is it in

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[6] That does not mean that Rhodes did not have implied license to stand where he did while searching the motorcycle. (Indeed, if Rhodes had pulled his police cruiser into the driveway up to where the motorcycle was parked—something any member of the public could have done—Rhodes would also have passed right by the motorcycle on his way to the front door). Assuming Rhodes did not step off a part of the driveway where he had implied license to be to access the motorcycle, his removal of the tarp to inspect the motorcycle's plate number and VIN could be defended under *New York v. Class*, 475 U.S. 106, 114 (1986) ("[I]t is unreasonable to have an expectation of privacy in an object [like a VIN] required by law to be located in a place ordinarily in plain view from the exterior of the automobile."). The Court does not need to rely on *Class* here, however, because the conceded existence of probable cause makes the point superfluous. Even assuming that

dispute that Officer Rhodes had probable cause to conduct that limited search. He did. There also is no question that probable cause for the search existed before Rhodes set foot on the driveway, and that the information supporting probable cause had been legitimately obtained; no one trespassed with a tracking device or a drug-sniffing dog to obtain it.

B. There is no separate exigency requirement to the automobile exception—regardless of the vehicle's location—but even if there were, it would be satisfied here.

Arguing that the Court should abrogate the automobile exception within the curtilage, Collins asserts that "[w]arrants and exigency cover legitimate needs for searches" there. Br. for Pet'r at 27; *see also id.* at 28 ("There is no reason to lay the broader, categorical automobile exception on top of these rules."). That reasoning is deeply flawed.

To begin with, Collins overlooks that the ready mobility of automobiles creates a categorical "exigency" that justifies a warrantless search if there is probable cause to believe a vehicle contains contraband. *See* Br. for Pet'r at 28 ("[P]olice already may search vehicles in the curtilage without a warrant in

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the motorcycle was parked on a part of the driveway within the curtilage, but outside the area where Rhodes had implied license to be, Rhodes's ample probable cause entitled him to access the motorcycle and search its exterior for its license-plate and VIN information.

the event of exigency."). The Court's precedents established long ago that "the inherent mobility of automobiles creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible." *Opperman*, 428 U.S. at 367; *see also Carney*, 471 U.S. at 392 ("[T]he exigencies attendant to ready mobility justify searches without prior recourse to the authority of a magistrate so long as the overriding standard of probable cause is met."); *Cardwell*, 417 U.S. at 590 (plurality opinion) ("An underlying factor in the *Carroll-Chambers* line of decisions has been the exigent circumstances that exist in connection with movable vehicles.").[7]

Collins's claim that moveable vehicles somehow pose no exigency when parked on a driveway is a frontal assault on the automobile exception; if accepted by this Court, it would undermine the applicability of the automobile exception not just on private property, but *everywhere*. That claim finds no support in this Court's precedents, which have repeatedly rejected Collins's assumption that some *additional* exigency is required to trigger the exception. *See*, *e.g.*, *Labron*, 518 U.S. at 938-39 (reversing the Pennsylvania Supreme Court's decisions to the contrary). The Court made that clear in *Dyson*: "[U]nder our established

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[7] A vehicle's characteristic ability to be quickly moved—including out of a jurisdiction and the reach of a warrant—obviously distinguishes it from other forms of contraband. While Collins may protest that "drugs and human beings" are "equally mobile," *see* Br. for Pet'r at 21, the only way they become "equally mobile" is if they are placed in a vehicle, at which point they become properly discoverable in a search supported by probable cause.

precedent, the 'automobile exception' has no separate exigency requirement." 527 U.S. at 466.

Thus, Officer Rhodes was not required to wait to act until Collins or someone else moved the motorcycle, as Collins suggests. *See* Br. for Pet'r at 27 (suggesting that instead of conducting an immediate search Rhodes had "the chance to make plans to engage the vehicle when it return[ed] to the street"). As this Court has noted, "[f]ollowing the [motorcycle] until a warrant [could] be obtained seems an impractical alternative since, among other things, the [motorcycle] may be taken out of the jurisdiction." *Chambers v. Maroney*, 399 U.S. 42, 51 n.9 (1970). Indeed, the speed of Collins's motorcycle had proved that pursuing it was not just "impractical" but impossible.

Collins also misses the point of the automobile exception when he proposes limiting its applicability to cases where the officer predicts "there is *actually* no time for a warrant." Br. for Pet'r at 28. Collins fails to appreciate that "the circumstances that furnish probable cause to search a particular auto for particular articles are most often unforeseeable," and "the opportunity to search is fleeting since a car is readily movable." *Chambers*, 399 U.S. at 50-51. Underlying the exception is the recognition that law enforcement cannot know when "the vehicle [will] be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Carroll*, 267 U.S. at 153. For instance, in the early case *Husty v. United States*, the Court recognized that "[the officer] could not know when Husty would come to the car or how soon it would be

removed." 282 U.S. 694, 701 (1931). "In such circumstances," the Court did "not think the officers should be required to speculate upon the chances of successfully carrying out the search." *Id.*

That the opportunity to search may be fleeting "is strikingly true" when, as here, "the automobile's owner is alerted to police intentions and, as a consequence, the motivation to remove evidence from official grasp is heightened." *Cardwell*, 417 U.S. at 590 (plurality opinion). While a warrantless search's validity does *not* "depend upon a reviewing court's assessment of the likelihood in each particular case that the [vehicle] would have been driven away . . . during the period required for the police to obtain a warrant," *Michigan v. Thomas*, 458 U.S. 259, 261 (1982) (per curiam), here Rhodes's opportunity to search did prove fleeting because Collins had been "alerted to police intentions," *Cardwell*, 417 U.S. at 590 (plurality opinion). Only a short time after informing police officers that he did not recognize the photograph of 2304 Dellmead Lane—or the motorcycle parked in its driveway—Collins prepared "to remove [the] evidence from official grasp," *id.*, by returning to the house, changing into motorcycle-riding garb, and slipping the key into his pocket. Thus, even if it were necessary to show, in retrospect, that the circumstances actually bore out the inherent exigency, the search here would be valid.

Finally, Collins seeks support from several cases for the proposition that the "'[e]xigent circumstances doctrine is adequate to accommodate legitimate law enforcement needs,'" Br. for Pet'r at 28 (quoting

Steagald v. United States, 451 U.S. 204, 222 (1981); citing *Missouri v. McNeely*, 569 U.S. 141, 165 (2013), and *Riley v. California*, 134 S. Ct. 2473, 2487 (2014)), but none of those cases is on point here. *Steagald* invalidated a warrantless search inside a third party's home conducted while executing an arrest warrant on a fugitive. But unlike in this case, where Rhodes had only just located the driveway shown in the Facebook photographs and had strong reason to believe that Collins would appear shortly to move the motorcycle, the law enforcement officers in *Steagald* "knew the address of the house to be searched two days in advance." 451 U.S. at 222. In *McNeely*, the Court rejected the idea that the loss of blood-alcohol-concentration evidence created a per se exigency, but partly because that evidence "is lost gradually and relatively predictably." 569 U.S. at 155. Here, by contrast, the evidence could be lost entirely and suddenly. And in *Riley*, it was conceded that "officers could have seized and secured [the defendants'] cell phones to prevent destruction of evidence while seeking a warrant," 134 S. Ct. at 2486—something that Collins does not concede. And that distinction does not matter when the automobile exception applies. *See Chambers*, 399 U.S. at 51 ("[A]s in *Carroll* and the case before us now, if an effective search is to be made at any time, either the search must be made immediately without a warrant or the car itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for the search.").

C. Officer Rhodes did not need a warrant to walk up the open driveway to reach a motorcycle that the automobile exception authorized him to search.

Given that probable cause and the automobile exception excused the need for a warrant to search the motorcycle, Collins is left to argue that Rhodes needed a warrant to cross a few feet of open driveway to access the motorcycle—in other words, that the "physical intrusion to search itself requires a warrant." *See* Br. for Pet'r at 13. Collins is mistaken for several reasons.

First, when the automobile exception applies, "[o]nly the prior approval of the magistrate is waived; the search otherwise is as the magistrate could authorize." *Ross*, 456 U.S. at 823. Collins does not deny that a magistrate would have issued Rhodes a warrant to *search* the motorcycle, had he applied for one, and that the warrant would have authorized him to do exactly what he did. A second, supplemental warrant to *access* the motorcycle would have been unnecessary. *See id.* at 820-21 (noting that a search "is not limited by the possibility that separate acts of entry or opening may be required to complete the search"). *Cf. Dalia v. United States*, 441 U.S. 238, 257 (1979) (warning against "pars[ing] too finely the interests protected by the Fourth Amendment" and noting that "[o]ften in executing a warrant the police may find it necessary to interfere with privacy rights not explicitly considered by the judge who issued the warrant"). Given that Rhodes's warrantless search was just "as the magistrate could

authorize," *Ross*, 456 U.S. at 823, no threshold warrant was needed to conduct it.

Second, Collins's novel proposal—that before an officer can conduct a legitimate warrantless search within the curtilage, he must obtain a warrant to enter the curtilage—would thwart not just warrantless automobile searches but *all* warrantless searches within the curtilage. An officer observing the ongoing destruction of contraband inside the curtilage would be helpless to intervene, for lack of a magistrate's permission to cross into the curtilage to do so. An officer who pulls over a vehicle onto the side of the road, onto the curtilage of a third party's property, could not approach the vehicle without first obtaining a warrant. Even a consent-based search of an object or area inside the curtilage could be jeopardized if the officer did not obtain specific consent not only to search that object or area but also to enter the curtilage first. Such examples seem unreasonable because they are: by necessary implication, authorization to search an area gives authority to access the area. *See id.* at 820-21 ("A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found."). Because Rhodes was permitted to search Collins's motorcycle, he was permitted to access it in order to search it.

Third, Rhodes did not need a warrant to cross the driveway because there was no "search" of that intervening space for Fourth Amendment purposes. Even assuming he stepped onto a part of the driveway where guests lacked implied license to be, *but see supra*

at 21-22 n.6, he still did not "search" the space between *him and the motorcycle because he did not "use[] a* physical intrusion to explore details of the home," *Jardines*, 569 U.S. at 11; he simply accessed the object of a lawful search. *See Scher*, 305 U.S. at 255 (noting that where a car passed "into the open garage closely followed by the observing officer" and was then searched, "[n]o search was made of the garage").

Given that he possessed probable cause to search *the motorcycle, Rhodes proceeded exactly as he was en*titled to under the automobile exception. Although he could have delayed his brief search to obtain a warrant to conduct the very same search, that would have required him to ignore the risk that Collins would return *and move the motorcycle in the interim; and that risk* is the very reason the automobile exception exists.

D. Collins's fears of roving police searches are not justified: a warrantless automobile search must be supported by probable cause, limited in scope, and reasonable.

Collins worries that upholding the search here would authorize "warrantless intrusions into garages or carports to remove protective covers and rummage through vehicles." Br. for Pet'r at 39. His fears of such intrusions are overblown and, in any event, lie beyond what the automobile exception permits.

*To begin with, whether a search is conducted pur*suant to a warrant or not, the search must be justified

by probable cause. "[T]he *Carroll* doctrine does not declare a field day for the police in searching automobiles. Automobile or no automobile, *there must be probable cause* for the search." *Almeida-Sanchez*, 413 U.S. at 269 (emphasis added). "[I]n a case showing probable cause, the Government and its officials are given the opportunity which they should have, to make the investigation necessary to trace reasonably suspected contraband goods and to seize them." *Carroll*, 267 U.S. at 156.

Collins also ignores that, under the automobile exception, "[o]nly the prior approval of the magistrate is waived; the search otherwise is as the magistrate could authorize." *Ross*, 456 U.S. at 823. Thus, Collins's concern about the potential scope of an automobile search lies not with the exception's waiver of the warrant requirement, but instead with the fact that probable cause permits officers to conduct automobile searches at all. *See* Br. for Pet'r at 19 (worrying that "[i]f the automobile exception applies on curtilage, . . . then the police can search a vehicle there (in driveways, parking patios, carports, or garages) day or night"). But officers already can conduct searches within the curtilage. Indeed, the scenarios Collins conjures up are as likely to transpire with a warrant as without—including his hypothetical that, "[b]y timing [a] search correctly," a "savvy police officer" could use the search as a "bootstrap" to peer "within the sanctity of the home." *Id.* at 30. That possibility is equally present when an officer searching an automobile close to a house has obtained a warrant for the search.

As it is, police officers may search only those areas or items that they have probable cause to search: "[t]he scope of a warrantless search based on probable cause is no narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause." *Ross*, 456 U.S. at 823. This limitation, among others, prevents police officers from "'trawl[ing] for evidence,'" *see* Br. for Pet'r at 34 (quoting *Jardines*, 569 U.S. at 6), in the ways that Collins fears possible if the automobile exception is upheld here—*e.g.*, that an officer could "'stan[d] on the porch and us[e] . . . binoculars to peer . . . into the home's furthest corners.'" *See id.* (quoting *Jardines*, 569 U.S. at 12 (Kagan, J., concurring)).

Collins also can take comfort in the requirement that every search must be reasonable. *See, e.g.*, *Maryland v. King*, 133 S. Ct. 1958, 1970 (2013) ("Even if a warrant is not required, a search is not beyond Fourth Amendment scrutiny; for it must be reasonable in its scope and manner of execution. Urgent government interests are not a license for indiscriminate police behavior."). "[E]very Fourth Amendment case, since it turns upon a 'reasonableness' determination, involves a balancing of all relevant factors. With rare exceptions not applicable here, however, the result of that balancing is not in doubt where the search or seizure is based upon probable cause." *Whren v. United States*, 517 U.S. 806, 817 (1996). Such "rare exceptions" include cases where searches and seizures are "conducted in an extraordinary manner" that is "unusually harmful to an individual's privacy or even physical interests—such

as, for example, seizure by means of deadly force, unannounced entry into a home, entry into a home without a warrant, or physical penetration of the body." *Id.* at 818 (internal citations omitted).

By any standard, Rhodes's search of the motorcycle was not unreasonable. First, the search was extremely narrow in scope and was conducted to obtain information in which Collins had no privacy interest whatsoever—the motorcycle's VIN and license-plate number. *See Class*, 475 U.S. at 114 (holding that a search of a VIN was reasonable because it is not subject to reasonable expectation of privacy for Fourth Amendment purposes). Second, the search was only minimally invasive, limited as it was to the motorcycle's exterior. *See Cardwell*, 417 U.S. at 592 (plurality opinion) (noting that "where probable cause exists, a warrantless examination of the exterior of a car is not unreasonable"). Searching the exterior of a vehicle "intrudes far less on individual privacy than does the incursion sanctioned long ago in *Carroll*." *Acevedo*, 500 U.S. at 576. "If destroying the interior of an automobile is not unreasonable," then Rhodes's search of the motorcycle's exterior could scarcely be considered unreasonable. *Id.*

Third, Rhodes's search was short in duration. "[C]arrying out an immediate search without a warrant," and completing it quickly, was less burdensome than the alternative: "seizing and holding [the motorcycle] before presenting the probable cause issue to a magistrate." *Chambers*, 399 U.S. at 52. "For constitutional purposes," this Court has held that there is

"no difference" between those two options—"[g]iven probable cause to search, either course is reasonable under the Fourth Amendment," *id.*—but Rhodes's brief search was clearly the less intrusive approach. Rhodes's search avoided interfering with the possessory interest, if any, that Collins had in his stolen motorcycle. Unlike the police officers in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), Rhodes conducted the search immediately, during the narrow window of time after he located the motorcycle and before Collins was able to remove the evidence. Fourth, Rhodes did not detour from conducting the primary search; he proceeded directly up the driveway to the motorcycle, and returned directly back down it. There is no assertion that he went beyond the scope of a reasonable, warrantless search. *Cf. Arizona v. Hicks*, 480 U.S. 321, 325-26 (1987) (holding that exigent circumstances may legitimate entry of a dwelling place, but a subsequent warrantless search is limited by the exigencies that justified its initiation; absent probable cause, a separate search is unconstitutional).

For all these reasons, Rhodes's search, supported by probable cause, was reasonable and faithful to the Fourth Amendment.[8]

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[8] In contrast with the "outright dangerous" nighttime searches Collins imagines, Br. for Pet'r at 20, Rhodes conducted the search here in the light of day. Although this Court has not held that the Fourth Amendment prohibits the execution of warrants at night, *but cf. Gooding v. United States*, 416 U.S. 430, 464-65 (1974) (Marshall, J., dissenting) (noting that such a limitation "may well be a constitutional imperative"), a warrantless search conducted at night may be invalidated on other grounds. *See, e.g.*,

II. The automobile exception and its supporting rationales do not automatically disappear inside a home's curtilage, and it would undermine the utility of the exception to restrict its application there.

A. The Court's case law demonstrates that a vehicle's location inside or outside the curtilage does not drive the analysis.

Nothing in the Court's precedents indicates that the automobile exception applies outside the curtilage but not inside it. Indeed, if its application were so cabined, "one would have expected that substantial limitation to be expressed." *Houghton*, 526 U.S. at 301.

1. *Scher* and *Labron* refute Collins's position.

The Court first upheld the search of an automobile on private property almost eighty years ago. Just thirteen years after *Carroll*, the Court invoked the automobile exception in *Scher*, where the police had followed the defendant's vehicle onto private property and into a garage, which was located "a few feet back of his residence and *within the curtilage*." 305 U.S. at 253 (emphasis added). Police searched the vehicle, discovered contraband liquor, and arrested Scher.

Fed. R. Crim. P. 41(e)(2)(A)(ii) (requiring execution of a warrant "during the daytime, unless the judge for good cause expressly authorizes execution at another time"); Fed. R. Crim. P. 41(a)(2)(B) ("'Daytime' means the hours between 6:00 a.m. and 10:00 p.m. according to local time.").

Scher urged the Court to limit the scope of the automobile exception to the facts of *Carroll*, arguing that it was "not a case where an automobile is stopped and searched on the highway. It is a case where private premises were invaded, and in the process of this invasion, an automobile is searched, in the garage, and within the curtilage of the private premises." Br. of Pet'r-Appellant, *Scher v. United States*, 1938 WL 63933, at *19-20; *see also* Br. for the United States, *Scher v. United States*, 1938 WL 63934, at *15 ("[Scher] also contends that the search of the automobile constituted a search of the garage and that, since the garage was within the curtilage of his home, it could not be searched without a warrant. We submit that the contentions are without merit.").

But this Court rejected Scher's construction of *Carroll* and the idea that the automobile exception does not apply on curtilage:

> Considering the doctrine of *Carroll v. United States*, 267 U.S. 132 (see *Husty v. United States*, 282 U.S. 694), and the application of this to the facts there disclosed, it seems plain enough that just before he entered the garage the following officers properly could have stopped petitioner's car, made search and put him under arrest. So much was not seriously controverted at the argument.
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> *Scher*, 305 U.S. at 254-55.

Collins dismisses *Scher* as irrelevant because the government also defended the search as one that was conducted incident to an arrest, Br. for Pet'r at 29, but

that flies in the face of this Court's own treatment of *Scher* as an automobile-exception case. *See, e.g.*, *Ross*, 456 U.S. at 809 & n.11 (citing *Scher* to show that "the exception to the warrant requirement established in *Carroll* . . . applies only to searches of vehicles that are supported by probable cause"); *id.* at 818 (citing *Scher* to show that "[i]n its application of *Carroll*, this Court in fact has sustained warrantless searches of containers found during a lawful search of an automobile").

Moreover, the search-incident-to-arrest component of the case does not explain the Court's observation that officers properly could have searched Scher's car "just before he entered the garage." *Scher*, 305 U.S. at 254-55. Indeed, the Court's citation to *Carroll* in support of that proposition validated then-Solicitor General Robert Jackson's contention for the government that "the prohibition against search of a dwelling without a warrant does not include searches of vehicles made upon probable cause. . . . Had they stopped the car and searched it prior to its being driven into the garage, no search warrant would have been requisite since they had probable cause." Br. for the United States, *Scher*, 1938 WL 63934, at *16. Thus, even from the early days of the automobile exception, it has been applied within the curtilage.

The Court also applied the exception on private property in *Labron*, which resolved two cases on the certiorari filings. In one of them, a truck "parked at the rear of [a] residence" had been searched "[w]ithout a warrant or Appellant's consent." *Pennsylvania v. Kilgore*, 677 A.2d 311, 312 (Pa. 1995), *rev'd sub nom.*

Pennsylvania v. Labron, 518 U.S. 938 (1996) (per curiam). Although the Pennsylvania Supreme Court concluded that probable cause existed to search the truck, it found the search was not justified because of the absence of "any exigent circumstances which would justify the failure of police to obtain a search warrant prior to searching the vehicle." *Id.* at 313. In opposing Pennsylvania's petition for certiorari, Kilgore noted that the "pickup truck in question was parked in a private driveway"; argued that the automobile exception does not apply where "the vehicle is on private land under police control"; and protested that Pennsylvania was "attempting to make the automobile exception apply to all automobiles, *per se*, regardless of circumstances." Resp't's Br. in Opp'n, *Pennsylvania v. Kilgore*, 1996 WL 33467564, at *1, *2, *5.

This Court reversed. Although it acknowledged that Kilgore's truck had been "parked in the driveway of the farmhouse," 518 U.S. at 939, that fact did not impact its analysis. Rather, the Court laid down a broad articulation of the automobile exception: "[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more." *Labron*, 518 U.S. at 940; *see also id.* at 944 (Stevens, J., dissenting, joined by Ginsburg, J.) (noting that "this Court has effectively converted the 'automobile exception' into an absolute rule allowing searches in the presence of probable cause").

Given the Court's categorical treatment of the automobile exception, it is not surprising that most

courts of appeals that have addressed the issue have also found that the exception applies within the curtilage.[9]

2. *Carney* and *Coolidge* do not support Collins's position.

Contrary to Collins's assertion, *see* Br. for Pet'r at 16-18, neither *Carney* nor *Coolidge* bars the application of the automobile exception within the curtilage. In *Coolidge*, police seized the car of a suspected murderer from his driveway three days after he had been arrested; it was "retained in police custody for more than a year and was searched not only immediately after seizure but also on two other occasions: one of them 11 months and the other 14 months after seizure." 403 U.S. at 523 (White, J., dissenting, joined by Burger, C.J.). Although the police had first obtained a warrant, the warrant was ruled invalid, and the Court had to assess whether a warrantless search could be justified under the search-incident-to-arrest doctrine, under the automobile exception, or under the plain-view doctrine. 403 U.S. at 453-73. In Part II-B of the opinion, authored by Justice Stewart, a plurality of the Court concluded that the automobile exception did not apply. *Id.* at 463-64. Collins attributes that result to the

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[9] *See United States v. Brookins*, 345 F.3d 231, 237-38 (4th Cir. 2003); *United States v. Markham*, 844 F.2d 366, 368-69 (6th Cir. 1988); *United States v. Hines*, 449 F.3d 808, 814-15 (7th Cir. 2006); *United States v. Blaylock*, 535 F.3d 922, 926-27 (8th Cir. 2008); *United States v. Hatley*, 15 F.3d 856, 858-59 (9th Cir. 1994).

vehicle's location in the driveway, which he claims "was critical." Br. for Pet'r at 17.

But Collins puts unwarranted emphasis on the driveway in *Coolidge*. To begin with, the plurality opinion there is "not a binding precedent." *Brown*, 460 U.S. at 737. Four dissenting Justices would have applied the automobile exception. *Coolidge*, 403 U.S. at 504 (Black, J., dissenting in part, joined by Burger, C.J., and Blackmun, J.); *id.* at 521-22 (White, J., dissenting in part, joined by Burger, C.J.). Although Justice Harlan's concurrence provided the fifth vote, he specifically declined to join Part II-B and said nothing about the significance of the driveway in his concurring opinion. *Id.* at 491 (Harlan, J., concurring). To date, "no circuit appears to read *Coolidge* as a per se rule against all driveway searches without a warrant." *United States v. Goncalves*, 642 F.3d 245, 251 (1st Cir. 2011). Indeed, doing so would require this Court to overrule *Scher*.

In any event, the *Coolidge* plurality made clear that it was the absence of "exigent circumstances" that dictated the outcome. 403 U.S. at 464 ("Here there was probable cause, but no exigent circumstances justified the police in proceeding without a warrant."); *id.* at 460 ("The opportunity for search was . . . hardly 'fleeting.'"). The plurality declined to apply the exception because it was not a "case where 'it is not practicable to secure a warrant,'" *id.* at 462 (quoting *Carroll*, 267 U.S. at 153)—an easy conclusion, given that the police had, in fact, obtained a warrant (albeit an invalid one). The plurality also refused to find any exigency in the fact that the "automobile was in a literal sense

'mobile.'" *Id.* at 461 n.18 ("A person who had the keys and could slip by the guard could drive it away. We attach no constitutional significance to this sort of mobility."). Thus, the plurality's reference to the car as "an unoccupied, parked vehicle not then being used for any illegal purpose," *id.* at 463 n.20, must be read in light of its conclusion that no exigency was present.[10]

Moreover, the plurality's determination that no exigency justified a search of the car in the driveway turned on the fact that the objects the police were searching for "were neither stolen nor contraband nor dangerous." *Id.* at 460. The automobile exception did not apply, the plurality reasoned, because "there is nothing in this case to invoke the meaning and purpose of the rule"—including "no alerted criminal bent on flight," "no contraband or stolen goods or weapons," and "no confederates waiting to move the evidence." *Id.* at 462.

In contrast to *Coolidge*, the presence of those factors here more than justified Rhodes's immediate search. There was ample probable cause to believe that the motorcycle was an instrumentality that had been used to commit multiple crimes, and a reasonable officer could have believed that Collins, having just been alerted to Rhodes's interest in the motorcycle, would immediately try to move it. *See supra* Part I.A.2. Unlike the police's three-day delay in searching the car in

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[10] As set forth above, *supra* Part I.B, the Court's decisions since *Coolidge* have rejected the view that some further exigency, in addition to an automobile's inherent exigency, is necessary.

Coolidge, Rhodes drove to the Dellmead property immediately after he learned of the motorcycle's probable presence there.

Collins also misreads *Carney* to preclude the search of a vehicle parked "up a private driveway," Br. for Pet'r at 18, reasoning that *Carney* involved a parking lot.[11] He says that conclusion follows from the Court's observation that the exception applies when a vehicle "is readily capable of . . . use [on the highways] and is found stationary in a place not regularly used for residential purposes." *See id.* (quoting *Carney*, 471 U.S. at 392-93). When read in context, however, it is clear that the Court employed the phrase "regularly used for residential purposes" merely to distinguish a motor home being used for transportation from one being used solely as a residence. *See Carney*, 471 U.S. at 393 ("[T]he vehicle was so situated that an objective observer would conclude that it was being used not as a residence, but as a vehicle."); *id.* at 394 (declining to define when a vehicle is "situated such that it is reasonable to conclude that the vehicle is not being used as a residence"); *id.* ("The exception has historically turned on the ready mobility of the vehicle, and on the presence of the vehicle in a setting that objectively indicates that the vehicle is being used for transportation.").

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[11] As the Virginia Supreme Court pointed out, the Court's opinion in *Carney* did not indicate whether the parking lot there "was a public facility or a privately owned lot." Pet. App. 20 n.9.

The Court in *Carney* left open that the outcome might be different for "a motor home that is situated in a way or place that objectively indicates that it is being used as a residence," such as if it were "elevated on blocks" or "connected to utilities," contrasting those circumstances with a motor home that had "convenient access to a public road." *Id.* at 394 n.3. Here, by contrast, there is no question that the location of Collins's motorcycle—parked on the driveway with "convenient access to a public road" after it had been used in two high-speed eluding incidents, *id.*—"objectively indicate[d] that the vehicle [was] being used for transportation," *id.* at 394.

Thus, nothing in *Carney*—which permitted the search of a *home* that was being used for transportation—prohibits the search of a *motorcycle* that clearly was being used solely for transportation.

B. The justifications for the automobile exception still apply when a vehicle is parked on a driveway close to a home.

Collins is also mistaken when he asserts that the justifications for the automobile exception evaporate when a vehicle's location on the driveway is inside the curtilage, rather than outside the curtilage. Br. for Pet'r at 19-27. The considerations animating the automobile exception—ready mobility and reduced privacy expectations—apply fully to Collins's motorcycle in the

location where it was parked, in a driveway with immediate access to the road.

First, the original rationale for the automobile exception—the capacity of a vehicle to be "quickly moved," *Carroll*, 267 U.S. at 153—remains true of vehicles parked in driveways with ready access to the road. It is not necessary that a vehicle actually be found in "use[] on the highways" if "it is readily capable of such use." *Carney*, 471 U.S. at 392. Were the rule otherwise, immobile vehicles would not be subject to the exception. *See Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) (observing that warrantless automobile searches "have been sustained in cases in which the possibilities of the vehicle's being removed . . . were remote, if not nonexistent"). Even a parked "vehicle is obviously readily mobile by the turn of an ignition key, if not actually moving." *Carney*, 471 U.S. at 392. That critical characteristic is equally true of vehicles parked in driveways, and it creates an exigency that justifies immediate intervention.

Here, there is no doubt that Collins's motorcycle was readily mobile and therefore easily could have been "put out of reach of a search warrant." *Carroll*, 267 U.S. at 151. It had twice been used to elude police, once at speeds exceeding 140 mph, and since then Collins had installed fresh tires. Pet. App. 62, 65. Parked only a car length or two into the driveway, with "convenient access to a public road," *Carney*, 471 U.S. at 394 n.3, the motorcycle could be kicked into gear in seconds. Whether the motorcycle was a few feet inside the curtilage or a few feet outside it does not change that

it could be very "quickly moved out of the locality or jurisdiction in which the warrant must be sought," *Carroll*, 267 U.S. at 153, or from the location particularly described in a warrant.

Second, the "further justification" for the automobile exception—the "reduced expectation of privacy in an automobile," *Labron*, 518 U.S. at 940—likewise does not turn on precisely how far up a driveway a vehicle is parked. Collins argues that some vehicle regulations apply only when the vehicle is driven on public roadways, and he appears to suggest that a search of a vehicle that has never left private property could draw no support from that justification. Br. for Pet'r at 22-23. But the Court has made clear that the reduced expectation of privacy derives "from the pervasive regulation of vehicles *capable of traveling* on the public highways." *Carney*, 471 U.S. at 392 (emphasis added). Indeed, just as a vehicle's VIN and license plate—two obvious markers of "pervasive regulation," *Labron*, 518 U.S. at 940—do not vanish once a vehicle is moved inside the curtilage, neither does the justification for the automobile exception.

Moreover, "[o]ne has a lesser expectation of privacy in a motor vehicle because its function is transportation" and it "travels public thoroughfares." *Cardwell*, 417 U.S. at 590 (plurality). Here, it was the motorcycle's alarming travel on "public thoroughfares" that sparked law enforcement's attention in the first place. *See Houghton*, 526 U.S. at 303 (automobiles may be "subjected to police stop and examination to enforce 'pervasive' governmental controls 'as an everyday

occurrence'") (quoting *Opperman*, 428 U.S. at 368). That the motorcycle managed to escape law enforcement's grasp in the eluding incidents and return to private property does not render it any less subject to regulation or the enforcement of traffic laws.

An individual's expectation of privacy in a vehicle is reduced even further when the vehicle, as in this case, is plainly visible from the street and parked on a driveway that is part of the normal route used by members of the public to access the home. "Given the fact that police may enter upon such commonly-used areas of the curtilage as a driveway in the course of a legitimate investigation, it would seem that a warrantless seizure of a vehicle from such a place is just as proper as it would be were the car parked on the street." Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 7.3(a) (Thomson/West 5th ed.) (Oct. 2017 update).

C. Police officers need bright-line rules when they confront inherently exigent circumstances, so any limitations to the exception should depend on unambiguous physical distinctions, not on indeterminate curtilage analyses.

This Court has long "noted the virtue of providing clear and unequivocal guidelines to the law enforcement profession." *Acevedo*, 500 U.S. at 577 (punctuation and citations omitted). From its first recognition of the automobile exception in *Carroll*, the Court has

realized the importance of a rule that "is easily applied and understood and is uniform." 267 U.S. at 159. Collins's proposal to make the automobile exception inapplicable within the curtilage—on some parts of a driveway but not others—would undermine that salutary goal. Although the result below fits comfortably within the Court's precedent, if the Court sees the need to limit the scope of the automobile exception on private property, the proper line to draw would be at the physical threshold of a house or a similar fixed, enclosed structure inside the curtilage like a garage.

1. Requiring case-by-case curtilage determinations would undermine the utility and purpose of the automobile exception.

Under Collins's view, before conducting a warrantless automobile search on private property, police officers with probable cause to conduct the search would first need to determine whether the automobile is located within the curtilage. Thus, if "the boundaries of the curtilage are [not] 'clearly marked,'" *Jardines*, 569 U.S. at 7 (quoting *Oliver v. United States*, 466 U.S. 170, 182 (1984)), as here, police officers presumably would be forced to analyze the factors set forth in *United States v. Dunn*, 480 U.S. 294 (1987), before searching a readily mobile automobile parked close to a home:

> [C]urtilage questions should be resolved with particular reference to four factors: [1] the proximity of the area claimed to be curtilage to the home, [2] whether the area is included

> within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the area from observation by people passing by.

Id. at 301.

But the *Dunn* Court itself admitted that these factors do not yield straightforward answers: "We do not suggest that combining these factors produces a finely tuned formula that, when mechanically applied, yields a 'correct' answer to all extent-of-curtilage questions. Rather, these factors are useful analytical tools." *Id.*

Requiring officers to make a multi-factor curtilage determination—and then undertake a separate exigency analysis if the curtilage analysis yields a conclusion that the vehicle is parked inside it—raises the potential for confusion and "heightened possibilities for error." *Sanders*, 442 U.S. at 771-72 (Blackmun, J., dissenting). Complicating the automobile exception in this manner "will mean that many convictions will be overturned . . . and guilty persons will be set free in return for little apparent gain." *Id.* Police officers conduct *hundreds of thousands* of involuntary searches of vehicles and their drivers each year.[12] Assuming even a small fraction of those searches are conducted on private property, the impact of a rule with unclear application could be far-reaching, throwing into doubt

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[12] *See* U.S. Dep't of Justice, Bureau of Justice Statistics, *Police Behavior during Traffic and Street Stops, 2011* (Sept. 2013 (rev. Oct. 27, 2016)) at 2, 10, https://www.bjs.gov/content/pub/pdf/pbtss11.pdf.

searches of vehicles on shared driveways or near multi-resident homes or where curtilage boundaries are not obvious.[13]

This Court's struggle to formulate a workable "container rule" to govern searches of containers found inside vehicles—distinct from searches of the vehicles themselves under the automobile exception—illustrates the importance, "not only for the Court as an institution, but also for law enforcement officials and defendants, that the applicable legal rules be clearly established." *Ross*, 456 U.S. at 825. The Court's decisions in *United States v. Chadwick*, 433 U.S. 1 (1977), *Arkansas v. Sanders*, 442 U.S. 753 (1979), and *Robbins v. California*, 453 U.S. 420 (1981), resulted in a "troubled" jurisprudence around vehicle searches. *Ross*, 456 U.S. at 817; *see also Acevedo*, 500 U.S. at 577 (recognizing the *Chadwick-Sanders* rule as "the antithesis of a clear and unequivocal guideline" (punctuation altered)). Those difficulties were resolved only by conforming the scope of warrantless vehicle searches to *Carroll*'s categorical rule. Thus, the Court announced in *Acevedo* that it would "interpret *Carroll* as providing

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[13] Further complicating the issue is Collins's point that an "'overnight guest in a home may claim the protection of the Fourth Amendment.'" Br. for Pet'r at 4 n.1 (quoting *Minnesota v. Carter*, 525 U.S. 83, 90 (1998)). Assuming that confers standing to exclude an officer not only from searching the home itself but also from walking up the driveway to the home, a guest's privacy interests may not be obvious—especially where, as here, the guest expressly disclaims any knowledge of the house or the vehicle. Pet. App. 59; JA 76-77.

one rule to govern all automobile searches." 500 U.S. at 580.

Rather than forcing police officers to conduct case-by-case curtilage and exigency determinations, the Court should retain a categorical rule that can be easily and consistently applied by police officers responding to the inherent exigencies posed by readily mobile automobiles.

2. The automobile exception should apply at least up to the threshold of an enclosed physical structure in the curtilage—a defined line that is easy to understand and adequately protects privacy and property interests.

To the extent the Court sees the need to articulate a limit to the scope of the automobile exception on private property—even though no such limit is required to resolve this case—the more sensible bright line would be at the physical threshold of a house or a similar fixed, enclosed structure like a garage. Prohibiting intrusion into an enclosed physical structure within a home's curtilage to conduct a warrantless automobile search would accord with existing Fourth Amendment case law.

The "'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" *Payton v. New York*, 445 U.S. 573, 585 (1980) (quoting *United States v. U.S. Dist. Court*, 407 U.S. 297, 313 (1972)). As Collins points out, Br. for Pet'r

at 10-11, it is inside the home that privacy interests are at their peak. In no setting "is the zone of privacy more clearly defined than when bounded by the *unambiguous physical dimensions* of an individual's home." *Payton*, 445 U.S. at 589 (emphasis added); *see also Silverman v. United States*, 365 U.S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."). In *Payton*, for instance, the Court found that the Fourth Amendment prohibits a warrantless entry into a suspect's home to make a routine felony arrest. 445 U.S. at 576. The Court reasoned that, "[i]n terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the *entrance to the house*. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Id.* at 590 (emphasis added).

Outside the "entrance to the house" is a different matter. In *United States v. Santana*, for example, this Court upheld the arrest of a suspect who had retreated from the "doorway of [her] house" back into the "vestibule." 427 U.S. 38, 41 (1976). The Court held that

> [w]hile it may be true that under the common law of property the threshold of one's dwelling is "private," as is the yard surrounding the house, it is nonetheless clear that under the cases interpreting the Fourth Amendment Santana was in a "public" place. She was not in an area where she had any expectation of privacy. . . . Thus, when the police, who

> concededly had probable cause to do so, sought to arrest her, they merely intended to perform a function which we have approved in [*United States v.*] *Watson*[, 423 U.S. 411 (1976)].

Id. at 42.

Drawing the line at the threshold of physical structures located inside the curtilage also would be more consistent with the privacy concerns that motivated this Court's decisions in *Kyllo v. United States*, 533 U.S. 27 (2001), and *Jardines*. In *Kyllo*, the Court noted that "the Fourth Amendment draws 'a firm line at the entrance to the house.'" 533 U.S. at 40 (quoting *Payton*, 445 U.S. at 590). The Court added that the "line . . . must be not only firm but also bright." *Id.* So the Court concluded that the use of "a device that is not in general public use, to explore *details of the home* that would previously have been unknowable *without physical intrusion*," constitutes a "search" under the Fourth Amendment. *Id.* (emphasis added).

Likewise in *Jardines*, this Court worried that the "right to retreat" into one's home "would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window." 569 U.S. at 6. The concurring Justices noted similarly that the officers had used "trained canine assistants to reveal *within the confines of a home* what they could not otherwise have found there." *Id.* at 13 (Kagan, J., concurring, joined by Ginsburg and Sotomayor, JJ.) (emphasis added). Citing *Kyllo*'s "intention to draw both a 'firm' and a 'bright' line at 'the

entrance to the house,'" the concurrence concluded that the officers had "conducted a search because they used a 'device . . . not in general public use' (a trained drug-detection dog) to 'explore details of the home' (the presence of certain substances) that they would not otherwise have discovered without *entering the premises*." *Id.* at 14-15 (emphasis added).

Collins's "right to retreat" into his girlfriend's home was not "significantly diminished" by Officer Rhodes's search of the motorcycle parked on the driveway. *Id.* at 6. And that search did not allow Rhodes to "explore details of the home that would previously have been unknowable without physical intrusion." *Kyllo*, 533 U.S. at 40. Accordingly, the Court can affirm the constitutionality of Rhodes's search while maintaining the "firm" and "bright" line that the Court has drawn "at the entrance to the house." *Id.*

The passages of Blackstone's *Commentaries* that Collins relies on—discussing the common-law crime of burglary—also support distinguishing warrantless searches inside fixed, physical structures from searches conducted outside of them. *See* Br. for Pet'r at 10-12 (citing 4 W. Blackstone, *Commentaries on the Laws of England* 223, 225 (1769 ed.)). Blackstone wrote that "the law regards thus highly nothing but permanent edifices"; so burglary could be committed in a "mansion or dwelling house," as well as a "barn, stable, or warehouse" if it is "parcel of the mansion-house" and "within the curtilage," even if it is "not under the same roof or contiguous" to the house. 4 Blackstone 225, 226. By contrast, burglary cannot "be committed

in a tent or booth erected in a market or fair." *Id.* at 226. It would "no more make[ ] it burglary to break it open, than it would be to *uncover a tilted waggon* [sic] in the same circumstances." *Id.* (emphasis added). Thus, even from that early time, a partially exposed vehicle simply has not been entitled to the same protections as a "mansion or dwelling house" or a "barn, stable, or warehouse" where a "waggon" or some other vehicle might be enclosed.

Having the automobile exception turn on whether or not the vehicle is enclosed within a physical structure—rather than simply whether it is located inside the curtilage—also aligns better with the justifications for the exception. First, while a vehicle's ready mobility does not depend on whether it is parked on one part of the driveway inside the curtilage, or on another part of the driveway outside it, *see supra* Part II.B, a vehicle parked inside an enclosed structure has its mobility limited by a physical barrier, making for less "convenient access to a public road." *Carney*, 471 U.S. at 394 n.3.

Second, notwithstanding the reduced expectations of privacy in vehicles, individuals have a greater expectation of privacy in enclosed areas shielded from public view, such as homes and garages, than they do in open curtilage. *Cf. Katz v. United States*, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection."). A driveway likewise is subject to a lower expectation of privacy, particularly when it is plainly visible from the street, as it was here.

Finally, when a vehicle is housed inside an enclosed structure, rather than outside it, it becomes more difficult to determine whether the vehicle is being "used for residential purposes." *Carney*, 471 U.S. at 392. While an officer may reasonably presume that a vehicle parked on a driveway is used for transportation—absent other indicia to the contrary—an officer cannot as easily make the same presumption about a vehicle parked inside a closed garage. *See* LaFave, *Search and Seizure* § 7.2(b) n.59 (noting that *Carney*'s language may distinguish a vehicle "located inside private premises (e.g., a garage)" from a vehicle "parked on the grounds of the residence").

III. If the curtilage determination matters, the case should be remanded.

If this Court decides that the outcome of this case turns on whether the motorcycle was parked on a portion of the driveway situated within the curtilage, the Court should remand the case to the Supreme Court of Virginia for further proceedings.

None of the courts below made a curtilage finding. *See* Pet. App. 105-07 (bench ruling); Pet. App. 41 (Va. Ct. App. op.) ("assum[ing] without deciding that Officer Rhodes entered the curtilage when he walked up the driveway"); Pet. App. 30 n.4 (Va. S. Ct. op.) ("I do not address the question of whether the part of the driveway where the motorcycle was parked . . . was curtilage. . . .") (Mims, J., dissenting). In fact, the Court of Appeals of Virginia, noting the lack of detail in the

record, expressly "decline[d] to conjecture the facts necessary to perform a precise analysis." Pet. App. 41.

But that does not mean, as Collins argues, Br. for Pet. at 32, that the Commonwealth did not dispute below Collins's curtilage claim. It did—*see, e.g.*, JA 239 (denying that "it is undisputed that Rhodes entered the curtilage")—and with good reason. To begin with, a driveway is not a "classic exemplar" of curtilage like the front porch in *Jardines*, 569 U.S. at 7. Unlike the front porch, which is connected to the home, the various possible configurations and lengths of driveways preclude a one-size-fits-all generalization; part of the driveway may be curtilage while another part of it may not be. *See, e.g.*, *United States v. Beene*, 818 F.3d 157, 162 (5th Cir. 2016) (finding that the portion of the driveway where the vehicle was parked "was not part of the curtilage").

And in this particular case, three of the four curtilage factors discussed in *Dunn* militate against finding that the motorcycle was parked within the curtilage. The driveway was not within an enclosure that also surrounded the home; the driveway was used only to park vehicles; and no fence or gate was used to shield activities in the driveway from passersby. *See* Pet. App. 112-13 (photographs). Under such circumstances, the portion of the driveway where the motorcycle was parked was not curtilage because it did not "harbor[] the 'intimate activity associated with the sanctity of a man's home and the privacies of life.'" *Dunn*, 480 U.S. at 300 (quoting *Oliver*, 466 U.S. at 180). Indeed, Collins himself posted pictures of the driveway and the

motorcycle on his Facebook page, refuting any notion that he tried to keep his activities there entirely private.

Contrary to Collins's suggestion, though, Br. for Pet'r at 34-35, this Court should not make a curtilage determination in the first instance. *See Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (noting that this Court "is a court of final review and not first view" and "[o]rdinarily . . . do[es] not decide in the first instance issues not decided below") (internal punctuation and citations omitted). If the Court concludes that a curtilage finding is determinative of the outcome here, then it should remand the case for resolution of that disputed question.

CONCLUSION

The judgment of the Supreme Court of Virginia should be affirmed.

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No. 16-1027

IN THE
Supreme Court of the United States

RYAN AUSTIN COLLINS,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Commonwealth mainly argues that the automobile exception should apply to any vehicle, anywhere. Given probable cause, says the Commonwealth, officers can search any vehicle and make any intrusion necessary to perform the search. Under that rule, it does not matter if the vehicle is in a driveway, behind a house, in a carport, in a garage, or even within a living space itself.

That proposed rule fails. In fact, this Court has rejected it before. In *Coolidge v. New Hampshire*, the Court ruled that the police committed an unconstitutional warrantless search of the defendant's car in his driveway. 403 U.S. 443, 479 (1971). Five justices refused to apply the automobile exception to validate the search. "If the police may, without a warrant, seize and search an unoccupied vehicle parked on the owner's private property, not being used for any illegal purpose, then it is hard to see why they need a warrant to seize and search a suitcase, a trunk, a shopping bag, or any other portable container in a house, garage, or back yard." *Id.* at 480 (majority op.); Petr. Br. 17. Yet the Commonwealth fails to address the *Coolidge* majority *at all*. Resp. Br. 38–41. In short, the Commonwealth's rule would carve a giant hole in the warrant requirement—the foundational Fourth Amendment protection for the home and its curtilage.

The Court crafted the automobile exception for vehicles during traffic stops and parked in public places. Accordingly, the vehicle cases the Commonwealth cites to support extending the automobile exception have nothing to do with the

home or curtilage or vehicles parked there. *Carroll, Husty, Chambers, Almeida-Sanchez, Cady, Cardwell, Thomas*, and *Ross* all arose at traffic stops, along public streets, or in public parking lots. Traffic stops, even hundreds of thousands of them, Resp. Br. 47 n.12, have nothing to do with this case.

Nor do the justifications for applying the automobile exception to traffic stops support warrantless intrusions into the curtilage of the home. "Consistent with . . . *Coolidge* and *Carney*, it is clear that the dual bases underlying the automobile exception . . . are inapposite to vehicles parked in a defendant's residential driveway." *Commonwealth v. Loughnane*, __ A.3d __, 2017 WL 5617657, at *8 (Pa. Oct. 22, 2017) (holding that the automobile exception does not apply in the defendant's driveway, within conceded curtilage).

Moreover, this Court does not recognize categorical exceptions to the warrant requirement for home searches based on what the police are searching for. Cocaine is illegal, quickly disposable, and readily seizable in public—yet to enter a home to look for it without a warrant requires a case-specific exigency. A motorcycle suspected of eluding the police weeks earlier deserves at least the same protection.

The judgment of the Supreme Court of Virginia cannot stand. This Court should hold that the automobile exception does not apply to vehicles found in the curtilage of the home.

ARGUMENT

I. A *per se* rule allowing warrantless automobile searches within the home and curtilage would thwart core Fourth Amendment protection.

Under the Commonwealth's proposed *per se* rule, probable cause alone allows searches of and for vehicles within the curtilage of the home (or the home itself, for that matter). This is a dramatic suggestion.

So, as an example: a traffic camera records an apparent instance of reckless driving. A police officer gets the owner's address from running the license plate in the video. To investigate who was driving the car at the time, that evening the officer goes to the address. There is a garage, and through its window he sees a car similar to the one on the video. To verify he has found the correct car, the officer proceeds into the garage. Once inside the garage, he sees an array of personal items in and around the car—things people reasonably expect to be private. He sees a stack of magazines with subscription information on the cover, a collection of woodworking and machining tools, and future Christmas gifts on a high shelf. Inside the car itself, he sees an employee ID with name and picture in the cup-holder, and parking receipts from a hospital parking lot. He also notices the car's registration is expired by two months.

The point is this: the officer has intruded into curtilage far beyond any implied license. There is probable cause, but no warrant. There is no case-specific exigency. If the Commonwealth's primary argument prevails, the automobile exception

authorizes this. (Under its backup argument, the same scenario is constitutional if this occurs in a carport next to the house, or in the back yard, instead of a garage). This is wrong. It runs afoul of the Fourth Amendment's core protection of the home and curtilage, under which warrantless searches are "presumptively unreasonable." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

In defending its rule, the Commonwealth cites the details of *this* case, which it views as reasonable—a daytime search that apparently took only a few minutes. But if the automobile exception applies, it is not limited to similar facts. For instance, the Commonwealth appears to concede that nighttime searches around homes are dangerous. Resp. Br. 33 n.8. Yet it offers no solution that even arguably could apply to most cases. *Id.* (citing only a rule that governs federal officers serving warrants). Nor does the Commonwealth deny that automobile searches can be violent and destructive. Petr. Br. 19–20.

A. Searches in curtilage require a warrant.

The core protection of the Fourth Amendment requires a warrant to search the home and curtilage. The Commonwealth says that an officer's view that he has probable cause is enough to justify an intrusion into the curtilage. Resp. Br. 27–29, 22 n.6 (urging that "ample probable cause entitled [Officer Rhodes] to access" inside curtilage). It is not.

First, searching a home requires a warrant. The warrant requirement stands among the "fundamental distinctions between our form of government, where officers are under the law, and the police-state where

they are the law." *Johnson v. United States*, 333 U.S. 10, 17 (1948). The Court has "consistently held that the entry into a home to conduct a search . . . is unreasonable under the Fourth Amendment unless done pursuant to a warrant." *Steagald v. United States*, 451 U.S. 204, 211 (1981) (absent consent or case-specific exigency).

Second, curtilage is "part of the home itself for Fourth Amendment purposes." *Oliver v. United States*, 466 U.S. 170, 180 (1984) (noting that "the curtilage . . . warrants the Fourth Amendment protections that attach to the home"); *id.* ("courts have extended Fourth Amendment protection to the curtilage"). As this Court recognized in *Florida v. Jardines*, "the identity of [the] home and what Blackstone called the curtilage" has "ancient and durable roots," and accordingly the curtilage "enjoys protection as part of the home itself." 569 U.S. 1, 6–7 (2013).

Curtilage protections matter. That is why the Court held that the warrantless search of a garage "adjacent to the dwelling" and "par[t] of the same premises" violated the Fourth Amendment. *Taylor v. United States*, 286 U.S. 1, 5 (1932). That also explains why the Court has only authorized the "warrantless search and seizure of garbage left for collection *outside* the curtilage of a home." *California v. Greenwood*, 486 U.S. 35, 37 (1988) (emphasis added). The Commonwealth provides no response to the cases recognizing that curtilage searches require warrants or case-specific exigent circumstances. Petr. Br. 12.

Third, an intrusion into the curtilage to investigate a vehicle is plainly a "search" under

Jardines. Resp. Br. 28–29. "When the Government obtains information by physically intruding on persons, houses, papers, or effects, a search within the original meaning of the Fourth Amendment has undoubtedly occurred." 569 U.S. at 5; *id.* at 19 (dissent) (agreeing that officers commit a Fourth Amendment search unless they stick "to the path that is typically used to approach a front door" and to "the same level of observation as would be expected from a reasonably respectful citizen.").

The Commonwealth counters that probable cause alone should be sufficient, even for vehicles within the curtilage. Resp. Br. 27–33; 21 n.6. But from *Carroll* onward, this Court's cases do not "require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords." *Almeida-Sanchez v. United States*, 413 U.S. 266, 269 n.2 (1973).

No quantum of probable cause overcomes the warrant requirement within the home or curtilage. An officer's "[b]elief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant." *Agnello v. United States*, 269 U.S. 20, 33 (1925); *accord Steagald*, 451 U.S. at 220–21 (requiring a warrant to search a third party's home, even when there is probable cause to believe the object of an arrest warrant is there).

The supposed horribles from enforcing the warrant requirement within the curtilage are a false alarm. Resp. Br. 28. First, an "officer observing the ongoing destruction of contraband inside the curtilage," *id.*,

would have a case-specific exigency to justify intruding. *E.g.*, *Kentucky v. King*, 563 U.S. 452, 460 (2011). Second, a traffic stop "onto the side of the road," Resp. Br. 28, will hardly ever occur in curtilage, particularly not the driver's (and in rare cases where it does, it could trigger hot pursuit principles anyway, as in *Scher*). Third, consent to search a vehicle within curtilage would naturally also invite access to that vehicle. *See Georgia v. Randolph*, 547 U.S. 103, 111 (2006) (courts construe consent in light of "widely shared social expectations").

B. *Coolidge* rejected the Commonwealth's primary argument, and this Court has not revived it since.

In addition to failing under first principles, the Commonwealth's *per se* rule does not survive precedent: the majority opinion in *Coolidge*.

The Commonwealth takes the same position rejected in *Coolidge*. Specifically, the *Coolidge* majority rejected the idea that a "warrantless seizure and search of automobiles [is] *per se* reasonable, so long as the police have probable cause." *Id.* at 479. And although the Commonwealth cites *Coolidge* multiple times, it never once addresses the *majority* opinion in that case. *See* Resp. Br. 38–41 (citing only the plurality and dissent).

The *Coolidge* majority refused to apply the automobile exception to the home and curtilage because "[i]f the police may, without a warrant, seize and search an unoccupied vehicle parked on the owner's private property, not being used for any illegal purpose, then it is hard to see why they need a

warrant to seize and search a suitcase, a trunk, a shopping bag, or any other portable container in a house, garage, or back yard." *Coolidge*, 403 U.S. at 480 (majority). Justice Harlan joined in that section of the opinion because he feared that "a contrary result in this case would . . . go far toward relegating the warrant requirement of the Fourth Amendment to a position of little consequence." *Id.* at 492 (concurring).

California v. Carney reaffirmed that the automobile exception does not apply everywhere, to all vehicles. 471 U.S. 386, 392 (1985). Rather, *Carney* identified two circumstances where the justifications for the automobile exception "come into play"—when a vehicle is "being used on the highways" and when it is parked "in a place *not* regularly used for residential purposes." *Id.* at 392–93. The curtilage of the home is by definition "a place . . . regularly used for residential purposes." *Id.* at 392.

Nor does *Scher v. United States* support the Commonwealth's position. The relevant part of *Scher* is just a few sentences long. Within those sentences that opinion leans on both hot-pursuit and search-incident-to-arrest principles. 305 U.S. 251, 254–55 (1938). *Scher* did not address (and had no reason to address) the stationary vehicle presented here, with no driver present. *Id.*; Petr. Br. 29. Unsurprisingly, the Commonwealth identifies no case that views *Scher* as establishing that the automobile exception applies within the curtilage. Nor did this Court itself find *Scher* controlling in *Coolidge*. *See* 403 U.S. at 459 n.17 (plurality) (characterizing *Scher* as a search-incident-to-arrest case).

The Commonwealth next contends that the four-page summary reversal in *Pennsylvania v. Labron*, 518 U.S. 938 (1996), establishes that warrantless vehicle searches in the curtilage are categorically reasonable. Resp. Br. 36–37. But no opinion at any level in *Labron* even mentions the word "curtilage." And the defendant in the underlying *Kilgore* case did not claim *any* Fourth Amendment rights in the property where his vehicle was searched—unlike Mr. Collins, who had undisputed Fourth Amendment rights. *See Commonwealth v. Kilgore*, 677 A.2d 311, 311 (Pa. 1995). Properly read, the summary reversal in *Labron* only confirms what should have already been clear—that the automobile exception is categorical when it applies. *Labron* does not expand or dictate its geographic scope.

C. Justifications for the automobile exception fade within the curtilage.

Even on their own terms, the justifications for the automobile exception lose much of their thrust within the curtilage of the home. *See Carney*, 471 U.S. at 392–93 (examining when the "justifications for the vehicle exception come into play").

Ready mobility. First, the mobility rationale does not support extending the exception. *Contra* Resp. Br. 42–44. Ready mobility is the general concern that "a moving automobile on the open road" will be "quickly moved out of the locality." *Almeida-Sanchez*, 413 U.S. at 269. Ready mobility peaks at a traffic stop (as in *Carroll*, *Chambers*, *Almeida-Sanchez*, *Thomas*, and *Ross*, all cases the Commonwealth relies on here).

In general, a vehicle parked in its owner's curtilage presents far less risk of quickly and permanently disappearing than the paradigmatic traffic stop or public parking lot. A car sitting in a public lot or by the roadside is in the middle of public travel. On the other hand, a car parked within the curtilage of its owner's home "is parked where the defendant lives and it will typically either remain there or inevitably return to that location." *Loughnane*, __ A.3d __, 2017 WL 5617657, at *8; *id.* (noting that "the concern about the inherent mobility of the vehicle does not apply, as the chance to search and/or seize the vehicle is not fleeting"). *See also State v. Hobbs*, 933 N.E.2d 1281, 1286 (Ind. 2010) ("[A] public parking lot is typically an interim destination, but a home's driveway is often the end of that day's travels."). Although probable cause may be "most often unforeseeable" at a random traffic stop, Resp. Br. 24, that is not true when police go to a specific address to search for evidence of a crime.

In any event, ready mobility does not excuse the warrant requirement within the home and curtilage. Drugs, for example, are readily mobile, yet police must secure a warrant even when they have probable cause to believe drugs are within the home. *See, e.g.*, *Vale v. Louisiana*, 399 U.S. 30, 34 (1970). The Commonwealth contends that drugs are only mobile like vehicles if they are *inside* a vehicle. Resp. Br. 23 n.7. But no car is necessary to destroy most illegal drugs: "drugs may be easily destroyed by flushing them down a toilet or rinsing them down a drain." *King*, 563 U.S. at 461. If a warrant or case-specific exigency is necessary to search for drugs inside the home or curtilage, the same should be true for vehicles found there.

Reduced privacy expectation. The reduced-privacy rationale does not support the Commonwealth's *per se* rule either. Pervasive regulation of vehicles reduces expectations of privacy where those regulations apply because police can "stop and examine vehicles" where those regulations are violated. *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976). The Commonwealth ignores that those regulations generally do not apply within the curtilage. Petr. Br. 23–24 & nn.4–9. *See Loughnane*, at *9 ("[A]utomobiles are not subject to pervasive regulation while parked in a driveway, nor do police have frequent noncriminal contact with vehicles so situated. These bases for the reduced expectation of privacy only become applicable when the car is on the public streets.").

The Commonwealth also relies on the outdated rationale that "'travel[ing] public thoroughfares'" reduces expectations of privacy. Resp. Br. 44. But the automobile exception no longer rests on that rationale. *See Carney*, 471 U.S. at 392; Petr. Br. 25 n.10. In any event, "[t]he 'public nature of automobile travel' as it 'travels in public thoroughfares' plainly has no application to a car parked in a person's driveway." *Loughnane*, at *9.

Applying the automobile exception within the curtilage of a home would abandon critical judicial oversight of warrantless and intrusive home-and-curtilage searches. The justifications for the exception do not support such a sacrifice.

D. Providing clear guidance to police does not favor extending the automobile exception.

The Commonwealth suggests that this case pits a clear, easy, bright-line rule against an "unworkable" proposal by Mr. Collins. Resp. Br. 3. On the contrary, this case has a bright-line rule offered on each side. Collins' bright-line rule is the one this Court has long recognized as being at the "very core" of the Fourth Amendment. *Jardines*, 569 U.S. at 6. It is the rule that searches within the home and curtilage presumptively require a warrant, not just probable cause. *Agnello*, 269 U.S. at 33. The Commonwealth's rule, on the other hand, would undercut this basic rule by drawing a dangerous and broad exception to it.

The difference between the Commonwealth's proposed rule and Mr. Collins' is that the Commonwealth would permit officers, on probable cause alone with no warrant, to rummage through cars in the carport while the family is on vacation, or in the parking patio at nine p.m. on a Tuesday.

The warrant requirement is a rule officers already live with every day. Many Fourth Amendment "effects" commonly venture out into the public. But when they return to the home or within the curtilage, police know they need a warrant to come and search for them there. This is true for suitcases, briefcases, overcoats, even illegal drugs. When these objects are within curtilage, the police presumptively need a warrant to search them. There is no good reason to treat a vehicle differently.

The Commonwealth nevertheless insists that a different rule is necessary for vehicles because it would be difficult for "police officers to conduct case-by-case curtilage . . . determinations." Resp. Br. 49. This is not true, for several reasons.

First, officers already make curtilage determinations in the field *all the time*, and secure warrants as a result. The distinction between curtilage, which is "part of the home itself for Fourth Amendment purposes," and unprotected "open fields" has been blackletter law for police training purposes since at least 1984. *Oliver*, 466 U.S. at 180. Any officer tasked with investigating around homes should be well acquainted with the concept. Open fields are places police know they may roam freely, with or without probable cause. Curtilage, at least when entered to physically search for evidence, requires a warrant or case-specific exigency.

Even officers executing search warrants must already make decisions about the scope of curtilage. Whether the warrant uses the term "curtilage" or not, a warrant for a home typically includes what is within the curtilage, but not what is beyond it. "Ordinarily, a description in a warrant of a dwelling at a certain place is taken to include the area within the curtilage of that dwelling, so that it would cover a vehicle parked in the driveway." *Glenn v. Commonwealth*, 390 S.E.2d 505, 509 (Va. Ct. App. 1990) (quoting 2 Wayne R. LaFave, Search and Seizure § 4.10(c), at 322 (1987)).

Second, this Court has recognized that the extent of curtilage is "familiar enough" to be "easily understood from our daily experience." *Jardines*, 569

U.S. at 7. The Court has repeatedly described the curtilage in very simple terms: it is the area "immediately surrounding and associated with the home." *Oliver*, 466 U.S. at 180; *Jardines*, 569 U.S. at 6 (same).

Third, there is no evidence that police have found this rule unworkable in states that recognize the protected status of vehicles within the curtilage. For instance, this has been the law in Illinois for at least fifteen years, and in Georgia for twenty. *See, e.g.*, *Redwood v. Lierman*, 772 N.E.2d 803, 813 (Ill. App. 2002); *State v. Vickers*, 793 S.E.2d 167, 171 (Ga. App. 2016) ("[V]ehicles, like any other item or location within the curtilage of a residence, are not to be searched without a warrant, consent, or exigent circumstances."); *State v. O'Bryant*, 467 S.E.2d 342, 344–45 (Ga. App. 1996) (throwing out a search of a vehicle in the curtilage on the defendant's driveway). Yet the Commonwealth offers no evidence that the warrant requirement causes actual problems in this context.

The Commonwealth's administrability concerns thus provide no reason to depart from the ordinary rules that apply to curtilage searches.

II. The proper scope of the automobile exception cannot justify the search here.

Applying the proper rule to this case requires only a succinct Fourth Amendment analysis. *First*, was the motorcycle parked in curtilage? Yes, despite the Commonwealth's newfound opposition. *Second*, did Officer Rhodes conduct any Fourth Amendment searches? Yes. The Commonwealth concedes that

uncovering the motorcycle was a search, and under *Jardines* entry into the curtilage for that purpose was a search as well. *Third*, was there a warrant or warrant exception? No. The parties agree there was no warrant. And the only at-issue exception—the automobile exception—does not apply to searches into or within curtilage. Consequently, the judgment below should be reversed.

A. The motorcycle was in the curtilage.

Just as in *Jardines*, no remand on the issue of curtilage is necessary. *Contra* Resp. Br. 55–56.

As a threshold matter, the Commonwealth never disputed curtilage below, and has waived the point. In the Virginia courts, Mr. Collins argued that the motorcycle was within the curtilage. Pet. App. 8–9 (detailing the exchange of arguments in the trial court); Pet. App. 98, 100. On appeal, he argued that curtilage was undisputed, JA157, JA205, and drew no meaningful response from the Commonwealth.

Objecting to waiver, the Commonwealth cites only a single page of the record: JA239. Resp. Br. 55. That page presents no actual argument that the motorcycle was not on curtilage—and certainly it did not argue that any *Dunn* analysis is necessary. Instead, the sole relevant quote is: "Collins argues it is undisputed that Rhodes entered the curtilage of a home. . . . His assertion, however, overlooks the standard of review and the fact that the Court of Appeals assumed without deciding, for purposes of the appeal, that Rhodes entered the curtilage. . ." JA239. In the end, the Commonwealth obtained a broader ruling from the Supreme Court of Virginia by avoiding disputing

curtilage at that court. The issue is waived. *Steagald*, 451 U.S. at 209.

Moreover, the Commonwealth's failure to deny curtilage below was well-founded. The record is more than sufficient to hold that the motorcycle was within the curtilage. The critical facts are undisputed: the motorcycle was parked a car's width away from the side of the house, past its front wall, near a side door, surrounded by brick walls on three sides, on a concrete parking patio beyond the end of the asphalt driveway. Pet. App. 113–14. Those facts alone establish that the motorcycle was "immediately adjacent to a private home," *Kyllo v. United States*, 533 U.S. 27, 33 (2001), and as obviously curtilage as a "porch," the "side garden," or the area "just outside the front window," *Jardines*, 569 U.S. at 6.

The Commonwealth does not deny that driveways can qualify as curtilage. *See, e.g.*, *Robinson v. Commonwealth*, 639 S.E.2d 217, 221 n.1 (Va. 2007) (noting the Commonwealth's concession that "the driveway was within the curtilage of the [defendants'] home"). Instead, it says that some parts of some driveways may not be curtilage. Resp. Br. 55. That is beside the point. The parking patio in *this* case could not be any closer to the house. Pet. App. 30 n.4. And the Commonwealth does not deny that if the parking patio is not curtilage, then it is open field—which would mean an officer could linger there with no warrant *and* no probable cause, peering with "super-high-powered binoculars" through the side door into the recesses of the home. *Jardines*, 569 U.S. at 12 (Kagan, J., concurring).

In fact, the Commonwealth itself has contended that a car parked on the side of a house is within the curtilage. The Commonwealth frequently benefits from urging that vehicles are parked within curtilage, because if they are, then a warrant for the dwelling covers the vehicles too. *See Glenn*, 390 S.E.2d at 509 (stating that a warrant for a dwelling includes vehicles within the curtilage). Thus, the Commonwealth has argued that a car parked "on the side of [a] house" could be searched under a warrant for the residence because it was "on the curtilage." Brief for Commonwealth, 2001 WL 34823089, at *4–5, *15, *Wilkins v. Commonwealth*, 559 S.E.2d 395 (2002). Even while this case was pending, the Commonwealth argued (without reference to *Dunn*) that a "motor vehicle that was approximately twenty feet from the house" was within the curtilage. *Wells v. Commonwealth*, 2017 WL 4622140, at *1 & n.2 (Va. Ct. App. Oct. 17, 2017); *see also* Brief for Commonwealth at 31, *Wells v. Commonwealth*, No. 0201-17-3 (Va. Ct. App. July 17, 2017) ("Because Wells was inside the curtilage when the warrant was executed, he was within its scope.").[1] Under the Commonwealth's own view of the curtilage *there*, the covered motorcycle was plainly within the curtilage *here*.

B. Curtilage searches occurred.

Under *Jardines*, as well as privacy principles, Officer Rhodes clearly committed two Fourth Amendment searches. His warrantless investigation

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[1] This document is publicly available upon request from the Clerk of the Court of Appeals of Virginia. For the Court's ease of reference, it can be accessed at https://goo.gl/VqhWCo

"was accomplished through an unlicensed physical intrusion." *Jardines*, 569 U.S. at 7. That investigation was unlicensed in two respects.

First, Officer Rhodes had no license to remove the motorcycle's cover. The Commonwealth concedes this. "[N]o one is arguing that a visitor . . . is impliedly invited . . . to remove the cover off a vehicle parked in a private driveway and to inspect its license-plate and VIN information." Resp. Br. 21; *see also* Br. for Am. Motorcyclist Ass'n as *Amicus Curiae*, at 8 ("[M]otorcyclists do not expect the covers to be removed from their motorcycles by strangers.").

Second, the implied license only "permits the visitor to approach the home by the front path." *Jardines*, 569 U.S. at 8; *see also id.* at 19 (dissent) (agreeing that the license requires officers to "stick to the path that is typically used to approach a front door."). Officer Rhodes made no effort to approach the front door. Pet. App. 6, 88; JA18. He walked past the steps to the front door on his right, and then turned left and approached the motorcycle. Pet. App. 112, 114; Pet. App. 30 n.4 (Mims, J., dissenting) (noting that the motorcycle was "beyond the front perimeter wall of the house, past the front porch and front door").

Because "property concepts and privacy concepts" naturally "align," *Jardines*, 569 U.S. at 13 (Kagan, J., concurring), Officer Rhodes' intrusion to search the motorcycle also violated Mr. Collins' reasonable expectations of privacy. The motorcycle was not pervasively regulated on the private parking patio, and it was shrouded by a privacy-protecting cover. *See* Br. for Am. Motorcyclist Ass'n as *Amicus Curiae*, at 7 ("Motorcycle owners—particularly those

without garages—rely on covers to protect their privacy."). Because the covered motorcycle was within the protected sphere of the home, the expectations of privacy were reasonable there. *See Redwood*, 772 N.E.2d at 813 ("By parking a vehicle in the driveway or yard of one's home, one brings the vehicle within the zone of privacy relating to one's home.").

C. This case is not about exigent circumstances.

The Commonwealth also tries to salvage the searches in this case by looking outside the automobile exception. It suggests that Mr. Collins' parked, covered motorcycle searched when no one was home nonetheless presented case-specific exigent circumstances. Resp. Br. 25–26.

That separate and independent issue is beyond the scope of the question presented, which addresses only the automobile exception. Pet. i. And the Supreme Court of Virginia pointedly refused to rely on exigent circumstances. Instead, it asserted repeatedly that the "appropriate" and "proper" ground for decision was the automobile exception. Pet. App. 12, 14, 13–14 (refusing to assess exigent circumstances).

More broadly, this case should have no effect on existing exigency doctrine. Holding that the automobile exception does not apply to vehicles found in the curtilage would change nothing about how the Fourth Amendment handles actual emergencies. *Riley v. California*, 134 S. Ct. 2473, 2487 (2014) (exigency exists when "the police are truly confronted with a 'now or never' situation"). Exigency doctrine requires a case-by-case analysis. *Missouri v. McNeely*,

569 U.S. 141, 149–50 (2013). For instance, in *Scher* the officers pursued a suspected bootlegger from the public street into his garage, creating a hot-pursuit exigency. 305 U.S. at 255.

But certainly not *every* vehicle parked in the curtilage of its owner's home will create a case-specific exigency. *Contra* Resp. Br. 22. For instance, no exigency existed in *Coolidge*. 403 U.S. at 464 (plurality) (finding no case-specific exigent circumstances to justify a warrantless search where the car was in the defendant's driveway and he had been arrested and his family moved to another house). *See also Richards v. Wisconsin*, 520 U.S. 385, 393 (1997) (probable cause to search for illegal drugs in the home does not categorically create exigent circumstances for a no-knock entry).

III. The Commonwealth's novel backup proposal is unjustifiable.

In the alternative, the Commonwealth suggests that the automobile exception should apply in some parts of the curtilage but not others. The Commonwealth's backup argument asks this Court to apply the automobile exception, but only outside an "enclosed physical structure" in the curtilage. Resp. Br. 13.

That rule is unprecedented and unsupportable. This Court's cases do not support slicing the curtilage into pieces and eliminating protection for some parts of it.

First, the Commonwealth's concession that at least some parts of the curtilage merit protection from the

automobile exception is significant. For the first time in this case, the Commonwealth admits that limiting the automobile exception within the curtilage would "comport[] with Fourth Amendment principles," and "accord with existing Fourth Amendment case law." Resp. Br. 13–14, 49.

Second, once it is conceded that Fourth Amendment principles protect certain parts of the curtilage, there is no good reason for drawing the line where the Commonwealth would put it. The Commonwealth would protect garages, but apparently not carports, back yards, driveways, or parking patios of any configuration.[2]

It does not matter that common-law burglary during Blackstone's time required breaking into a building. Resp. Br. 52–53. Fourth Amendment curtilage exists for a different reason: to protect privacy. *See Jardines*, 569 U.S. at 7 (observing that curtilage "is where privacy expectations are most heightened"); *id.* at 13 (Kagan, J., concurring) (noting that "privacy expectations are most heightened in the home and the surrounding area").

Because of reasonable expectations of privacy, curtilage protections cover areas, not just buildings. There are countless places in this country where a person can stand on a driveway, within curtilage but outside any enclosed structure, and look directly into

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[2] The exact scope of the Commonwealth's rule is not clear. Would a carport qualify as a "fixed, enclosed structure"? Resp. Br. 49. Or a garage with the overhead door open? Adding this rule to the existing Fourth Amendment boundary at the edge of curtilage (a distinction police already must regularly make) would create new and unnecessary complications.

a side or back window, as close to the home as any front porch. *Jardines*, 569 U.S. at 6 (refusing to permit police to "enter a man's property to observe his repose from just outside the front window"); *id.* at 12 (Kagan, J., concurring) (supporting curtilage protection to prevent a person with binoculars from seeing "through your windows, into your home's furthest corners"); *United States v. Karo*, 468 U.S. 705, 714–15 (1984) (obtaining information that "could not have [been] obtained by observation from outside the curtilage" violated the expectation that homes enjoy "privacy free of governmental intrusion not authorized by a warrant").

The reasonable expectation of privacy protected by curtilage principles cannot survive if the automobile exception trumps it everywhere except within actual separate buildings. Whatever is within the curtilage is entitled to its protection. *Redwood*, 772 N.E.2d at 813 (holding that vehicles in curtilage are "within the zone of privacy").

Third, perhaps for this reason, the Commonwealth cites not one case actually adopting its gerrymandered proposal. That silence is telling.

On the contrary, this Court has recognized that land outside of enclosed physical structures is curtilage. *Coolidge* recognized that the warrant requirement applies equally to a "container in a house, garage, *or back yard*." *Coolidge*, 403 U.S. at 480 (emphasis added). *Jardines* addressed front porches, which are classic curtilage but seldom "enclosed" in the sense the Commonwealth seems to mean here. *Jardines* nevertheless held that the front porch "enjoys protection as part of the home itself."

569 U.S. at 6. *See also California v. Ciraolo*, 476 U.S. 207, 213 (1986) (yard is curtilage); *Dow Chemical Co. v. United States*, 476 U.S. 227, 239 (1986) (addressing whether "open areas of an industrial plant complex" qualified as "curtilage" and concluding it did not without requiring anything be inside of a building). Nor does *United States v. Dunn* require an enclosed physical structure like a garage—or even a fence—to qualify as curtilage. 480 U.S. 294, 301 (1987).

United States v. Santana, 427 U.S. 38 (1976) does not help the Commonwealth. Resp. Br. 50–51. *Santana* is an *arrest* case with a case-specific exigency (a hot pursuit) to boot. Even if *Santana* could be expanded to the search context and read as casting curtilage protections into doubt, that doubt could not survive *Jardines*. *Jardines* held that in *search* cases, the property principles ignored in *Santana* grant the front porch "protection as part of the home itself." 569 U.S. at 6.

Fourth, the import of the Commonwealth's suggestion is that people wealthy enough to have garages get far more Fourth Amendment protection than those with carports or who park beside or behind their homes. But even "the most frail cottage in the kingdom" is entitled to the protections of its surrounding curtilage, just as is "the most majestic mansion." *United States v. Ross*, 456 U.S. 798, 822 (1982). The Commonwealth's proposal gerrymanders straight through the middle class of this country, drawing a remarkably arbitrary line between otherwise very similar living arrangements.

CONCLUSION

As the *Coolidge* plurality urged, "there is a significant constitutional difference between stopping, seizing, and searching a car on the open highway, and entering private property to seize and search an unoccupied, parked vehicle not then being used for any illegal purpose." 403 U.S. at 463 n.20. For these reasons, the judgment of the Virginia Supreme Court should be reversed.

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IN THE

Supreme Court of the United States

RYAN AUSTIN COLLINS

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF AMERICAN MOTORCYCLIST ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICUS CURIAE*

The American Motorcyclist Association ("AMA") is the world's largest motorcycling organization, with more than 200,000 members. Since 1924, the AMA has protected the future of motorcycling and promoted the motorcycle lifestyle. AMA members come from all walks of life, and they navigate many different routes on their journey to the same destination: freedom on two wheels.

The AMA advocates for motorcyclists' interests in the halls of local, state and federal government, the committees of international governing organizations, and the court of public opinion.

This case presents an issue of particular importance to *amicus* and its members, who urge this Court to protect motorcyclists' rights to privacy in their vehicles to the same as extent as other members of the public.

The legal issues in this case are ably addressed by Petitioner. *Amicus* submits this brief to highlight factual issues surrounding motorcycle ownership and the use of motorcycle covers.

SUMMARY OF ARGUMENT

This Court's analysis should not be affected by the fact the vehicle searched was a motorcycle rather than a car or truck. Millions of law-abiding

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[1] The parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that this brief was not authored in whole or in part by counsel for a party and that none of the parties or their counsel, nor any other person or entity other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Americans ride motorcycles and enjoy the motorcycle lifestyle. There is nothing inherently suspicious—and no inherent justification for a search—in the use or ownership of a motorcycle.

Nor is there anything suspicious in the use of a motorcycle cover, which the opinions below mistakenly describe as a "tarp." Pet. App. 6, 35. Motorcycle covers are commonly used to protect motorcycles from the elements, to provide privacy, and to prevent theft. By removing and looking beneath the cover of the motorcycle parked in the curtilage of the home, the police conducted a warrantless search in violation of the Fourth Amendment.

ARGUMENT

I. Law-Abiding Americans Enjoy Motorcycle Ownership.

Although this case involves the search of a motorcycle parked in the curtilage of a home, motorcycle owners enjoy rights to protection from unreasonable searches and seizures that are no different from the rights enjoyed by the owners of other types of vehicles. The search of a motorcycle should be treated no differently than the search of any other vehicle.

Popular culture—as far back as *The Wild One* (Columbia Pictures 1953), featuring Marlon Brando—often portrays motorcyclists as dangerous and lawless. *See* Tracy Reilly, *Marks of Mayhem & Murder: When a Few Bad Mongols Spoil the Bunch, Should the Government Seize a Motorcycle Association's Registered Trademark*, 7 Buff. Intell. Prop. L.J. 1, 8 & n.24 (2009) (noting the

"stigmatization" of motorcyclists). But in truth, millions of law-abiding, hard-working Americans enjoy riding motorcycles. *Id.* at 8.; *see also* Randal Montgomery, *The Outlaw Motorcycle Subculture*, 1 Can. J. Criminology & Corrections 332, 332 (1976) ("It is important to differentiate between the vast majority of 'normal' motorcycle riders and the 'deviant' minority.").

Many are attracted to the experience of riding. As cars increasingly isolate us from the world outside, with ever-more technological distractions, motorcycles still require riders to feel the wind, hear the sound of the traffic, and engage with the world around them. *See* James G. Stevens, *If I Have to Explain Why You Wouldn't Understand*, 56 Ala. Law. 358, 359–60 (1995) ("[Y]ou must be in tune with everything that is going on around you. . . . [Y]ou are overwhelmed with the sense . . . that you have become a part of the surroundings."). Riding a motorcycle presents a challenge, requiring the rider to maintain constant attention and concentration. *Id.* ("Riding requires the utmost of concentration. One mistake riding is all you get.").

A passage from *Zen and the Art of Motorcycle Maintenance* describes the experience of riding a motorcycle:

> [In a car,] [y]ou're a passive observer and it is all moving by you boringly in a frame.
>
> On a cycle the frame is gone. You're completely in contact with it all. You're *in* the scene, not just watching it anymore, and the sense of presence is overwhelming. That concrete whizzing by five inches below your foot is the real thing, the same stuff you can

> walk on, it's right there, so blurred you can't focus on it, yet you can put your foot down and touch it anytime, and the whole thing, the whole experience, is never removed from immediate consciousness.

Robert M. Pirsig, *Zen and the Art of Motorcycle Maintenance* 5 (HarperTorch 2006) (1974).

Others relish the camaraderie of motorcycle culture. More than a hobby, motorcycling is a lifestyle, with a shared bond between riders. Motorcyclists can ride with groups at the local, state, or national level, and many participate in charity events. *See* Stevens, 56 Ala. Law. at 359–60 ("They informed me that there are rider's clubs around the state that include all levels of society, from blue collar workers to professionals, and spanning all age groups.").

Motorcycles also benefit the environment: "The rising popularity of motorcycles can be attributed to the benefits of motorcycle usage, including greater fuel-efficiency, and can lead to decreased roadway congestion while inflicting very little wear and tear on American roadways." H.R. Rep., No. 110-655, at 1–2 (2008).

Regrettably, some members of law enforcement have accepted popular culture's portrayal of motorcyclists and assume that riding a motorcycle is, itself, suspicious. This potential for prejudice against motorcyclists has been recognized and addressed by Washington State, which requires local law enforcement to adopt policies condemning "motorcycle profiling," which it defines as "the illegal use of the fact that a person rides a motorcycle or wears motorcycle-related paraphernalia as a factor in

deciding to stop and question, take enforcement action, arrest, or search a person or vehicle." Wash. Rev. Code Ann. § 43.101.420.

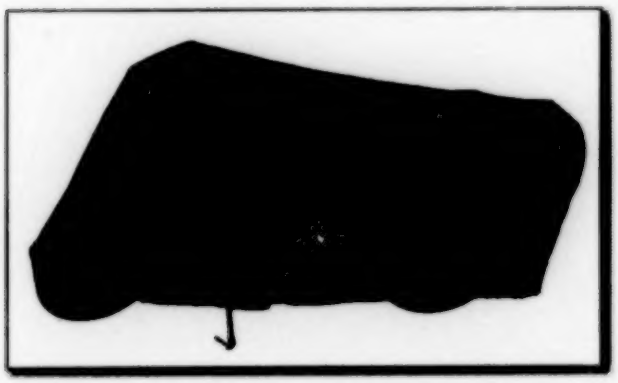
Just like Americans who own cars and trucks, American motorcyclists have a reasonable expectation of privacy in their vehicles parked in the curtilage of their homes. This Court should hold that all vehicles—regardless whether they have two wheels or four—are protected from warrantless searches while parked in the curtilage of a home.

II. Motorcycle Covers Serve Lawful Purposes.

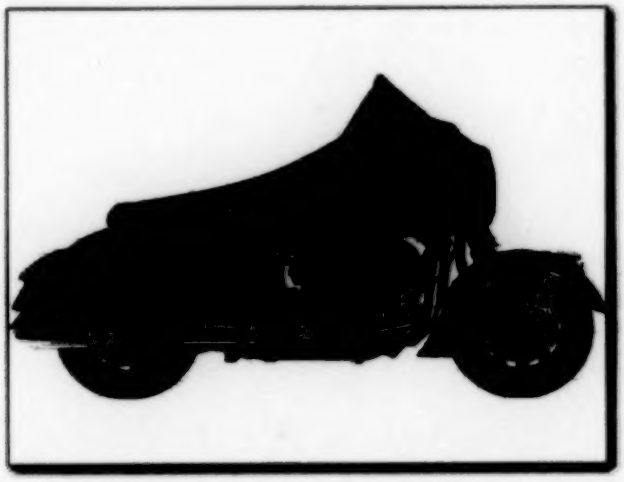
Nor should this Court treat the use of a motorcycle cover as inherently suspicious. Covers are often used by law-abiding motorcyclists to protect their vehicles against the elements, to provide privacy, and to prevent theft.

The courts below mistakenly referred to the motorcycle cover as a "tarp." As Petitioner notes, the motorcycle was actually covered by a motorcycle cover, designed to protect a motorcycle. *See* Pet. Br. at 5 n.2 (citing Pet. App. 6, 35, 114).

Covers come in all shapes and sizes. At one extreme, a cover might be a fully waterproof shell: Such a cover provides security and protection at the expense of convenience.



At the other extreme, when traveling, a rider might bring only a lightweight, portable cover, such as a "half-cover" that covers only a portion of the motorcycle:



The most obvious purpose of covers is protecting motorcycles from the elements. When parked outside, motorcycles require covers for protection from dirt, dust, snow, and rain. Even if a motorcycle is stored in a garage, a cover made from a light, soft, abrasion-resistant fabric can protect the motorcycle from dust and scratches. Motorcyclists can select different

covers depending on the environment in which they primarily ride and their subjective tradeoff between convenience and protection.

The variations are endless. Covers intended to protect bikes from rain will come with a waterproof lining. Some may be merely water-resistant (but breathable). Others are truly waterproof and include moisture vents and grommets for tying down the cover. Protecting motorcycles from damage from sunlight requires a cover with UV protection. Other possible features include heat-resistant panels, which avoid the problems that arise when covers are placed immediately onto hot exhausts.

Covers also play an important role in protecting motorcycles from theft. To steal a covered motorcycle, the thief must first remove the cover. Not only does this delay the theft and force the potential thief to engage in suspicious activity, but many covers have locking mechanisms, such as grommets at the bottom through which cable locks can be threaded.

In addition to making theft more difficult, covers can also prevent theft by concealing the bike. A covered bike will be far less likely for thieves to notice, and even when a potential thief knows that a motorcycle is under the cover, the value of the cycle cannot be determined without removing the cover. Motorcycle owners—particularly those without garages—rely on covers to protect their privacy and avoid advertising their ownership of an expensive bike to the world.

Within the motorcycle community, the cover is understood to be an integral part of the motorcycle. Regardless whether covers are secured with locks,

motorcyclists do not expect the covers to be removed from their motorcycles by strangers.

Removal of a motorcycle's cover without the owner's permission would be, at the least, highly suspicious. It would almost certainly be understood as a prelude to theft (either of the motorcycle itself or personal possessions stored on the motorcycle) or vandalism.

The cover on a motorcycle can thus be understood as the rough equivalent of the top of a convertible. Even when the cover (or car) is unlocked, its removal still intrudes upon the reasonable expectations of privacy of the vehicle's owner.

Motorcycles should receive no less protection from unreasonable searches than other vehicles. When the police removed the cover from Petitioners' motorcycle, a search occurred. And as Petitioner contends, because that search occurred without a warrant and in the curtilage of a home, the search violated the Fourth Amendment.

Amicus and its members urge this Court to hold that motorcyclists' protections against unreasonable searches and seizures should not be limited based on the type of vehicle at issue.

CONCLUSION

Amicus expresses no opinion regarding petitioner's ultimate guilt or innocence. Motorcycle theft is a serious crime that warrants serious punishment, but motorcycles should not be subjected to unreasonable searches and seizures. The judgment of the Supreme Court of Virginia, which fails to respect these rights, should be reversed.

November 20, 2017 Respectfully submitted,

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No. 16-1027

In the Supreme Court of the United States

RYAN AUSTIN COLLINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies promotes the principles of limited constitutional government that are the foundation of liberty. To those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.[1]

The Framers of our Constitution recognized that the Fourth Amendment's protection against abuse of government authority is a critical bulwark of Americans' liberty. That protection remains just as essential today. Cato files this brief to explain why the decision below improperly diminishes the Fourth Amendment's core protection of the privacy of Americans' homes.

SUMMARY OF ARGUMENT

"A man's home is his castle" is not just an aphorism—it is also a longstanding legal principle. From Biblical times through to the English common law, the home was recognized as a place of refuge in which the owner is protected against uninvited private parties and unjustified government intrusion.

That legal protection against arbitrary government incursions into the home was embodied in the

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties have provided written consent to the submission of this *amicus* brief.

Fourth Amendment, which resulted in large measure from Americans' reaction to the British authorities' use of general warrants and writs of assistance to search colonists' homes without any individualized suspicion. As a result of this history, "when it comes to the Fourth Amendment, the home is first among equals." *Florida* v. *Jardines*, 569 U.S. 1, 6 (2013).

At common law, and under the Fourth Amendment, the protection accorded to the home extends to its surrounding grounds and out-buildings—the curtilage. "'[I]ntimately linked to the home, both physically and psychologically," the curtilage is regarded "as part of the home itself for Fourth Amendment purposes." *Ibid.*

The Fourth Amendment's protection of the home and its curtilage is one example—albeit the clearest example—of the Amendment's protection against unreasonable government intrusion into Americans' private property. The text of the Amendment refers to "[t]he right of the people to be secure in their * * * houses, papers, and effects," and the Court's application of its protections encompasses "government trespass upon the areas ('persons, houses, papers, and effects') [the Amendment] enumerates." *United States* v. *Jones*, 565 U.S. 400, 405 (2012).

Permitting warrantless searches of vehicles parked on the home's curtilage is squarely inconsistent with the Fourth Amendment's special solicitude for the privacy of the home. And it would permit officers to intrude further by employing the plain view doctrine with respect to other parts of the curtilage or home visible as a result of an intrusion to search the parked vehicle.

The principal justification for allowing warrantless searches of vehicles is the reduced expectation of privacy in vehicles as they travel on public roads. But there is no such reduced expectation when a vehicle is parked at home. To the contrary, expectations of privacy are at their zenith in the home and its surroundings.

To the extent the automobile exception rests on vehicles' mobility—and the Court has moved away from that rationale—a vehicle parked at home is immobile. And if it leaves the home and curtilage it would become subject to search.

Moreover, "the availability of the exigent circumstances exception" assures that the warrant requirement does not undermine critical law enforcement needs. *Riley* v. *California*, 134 S. Ct. 2473, 2494 (2014). For example, the need to prevent physical harm or destruction of evidence and the "hot pursuit" doctrine will allow officers to intrude on the curtilage without a warrant. In the absence of those circumstances, however, the Fourth Amendment's warrant requirement applies to protect Americans' most private refuge against the abusive use of government power.

ARGUMENT

The Officers Were Required To Obtain A Warrant To Search Petitioner's Vehicle.

A. The Fourth Amendment provides especially strong protection for individuals' homes and surrounding curtilage.

The home has long been afforded special protection against unjustified intrusion by government authorities. The Fourth Amendment, reflecting that

history and the colonists' outrage at British searches without warrants supported by individualized probable cause, incorporates special solicitude for the home. And, as was true at common law, that protection extends to a home's surrounding curtilage.

1. Special protection for the privacy of the home has a lengthy historical pedigree.

Long before America won its independence, an individual's special privacy right in his home was well-established.

The Book of Deuteronomy instructs that a lender should not go into his neighbor's house to secure repayment: "When thou dost lend thy brother any thing, thou shalt not go into his house to fetch his pledge. Thou shalt stand abroad, and the man to whom thou dost lend shall bring out the pledge abroad unto thee." *Deuteronomy* 24:10-11. Similarly, Joshua declined to send his messengers to search Achan's tent for stolen goods until he had secured a confession from Achan himself. *Joshua*, 7:16-24.

The Romans also believed the house was "not only an asylum but was under the special protection of the household gods." 1 Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 15 (1937).

Anglo-Saxon and Norman law sought to specially protect the home by harshly punishing its breach. In Anglo-Saxon law, "*domus invasio*," home invasion, was a crime punishable by execution. *Id.* at 19.

English common law incorporated the same precept, recognizing that "a man's house is his castle." Edward Coke, *The Institutes of the Laws of England*

162 (London, Fletcher, Lee, & Pakeman 1644); see also *Semayne's Case* (1604), 77 Eng. Rep. 194, 195 ("the house of everyone is to him as his castle and fortress").

That axiom was given life by the courts, which punished violations of the home more harshly than violations of other property. Burglary at common law was limited to the breaking and entering of a dwelling house or other building located on its curtilage. 2 Wayne R. LaFave, *Substantive Criminal Law* § 21.1 (2d ed. 2003). And acts committed with the intent of inflicting a harm generally were punished as a misdemeanor, but "breaking into a *house* at night with the intent to commit a felony was itself a felony." Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 642 n.259 (1999) (emphasis added).

Protection against unjustified government intrusions into the home was also an element of English common law. William Pitt enunciated the principle in his famous address to the House of Commons in 1763:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter!

William Pitt, Earl of Chatham 1708-78, *Oxford Dictionary of Quotations* (7th ed. 2009). It was adopted by English courts in the celebrated *Wilkes* and

Entick cases,[2] described by one legal historian as "the most famous colonial-era cases in all America—the O.J. Simpson and Rodney King cases of their day." Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 Suffolk U. L. Rev. 53, 65 (1996).

Wilkes involved a broad warrant issued by the Secretary of State without probable cause under oath. That warrant authorized searches of the homes and private papers of numerous individuals potentially responsible for publication of *The North Briton No. 45*, which criticized the King. Government agents "ransacked houses and printing shops in their searches, arrested forty-nine persons (including the pamphlet's author, Parliament member John Wilkes), and seized incriminating papers—all under a single general warrant." M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief that Gave It Birth*, 85 N.Y.U. L. Rev. 905, 910 (2010).

Several of the individuals targeted brought tort actions against those executing the warrant seeking damages in trespass for the searches, seizure of papers, and arrests. *E.g.*, *Wilkes* v. *Wood* (1763), 98 Eng. Rep. at 489, 489. The courts held that the general warrant did not provide a defense against liability, because such warrants were "illegal, and contrary to the fundamental principles of the constitution." *Id.* at 499; accord *Money* v. *Leach* (1765), 97 Eng.

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[2] *Wilkes* v. *Wood* (1763), 98 Eng. Rep. 489; *Entick* v. *Carrington* (1765), 95 Eng. Rep. 807.

Rep. 1075, 1088; *Huckle* v. *Money* (1763), 95 Eng. Rep. 768, 769.[3]

2. The Fourth Amendment was adopted to safeguard the privacy of Americans' homes.

James Otis's speech in Boston against writs of assistance—which authorized general searches by the British of colonists' homes[4]—famously invoked the house-as-castle metaphor. 2 *Legal Papers of John Adams* 142 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965). That speech was, according to John Adams, "'the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.'" *Riley* v. *California*, 134 S. Ct. 2473, 2494 (2014) (citation omitted).

It therefore is not at all surprising that "[t]he sanctity of the home lay at the heart" of the precursors to the Fourth Amendment included in the state constitutions of Massachusetts, New Hampshire, Pennsylvania, and Vermont. Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1277 (2016).

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[3] Another general warrant targeted the publisher of an allegedly seditious pamphlet. In the suit by the publisher seeking damages in trespass for harm resulting from the search, the court rejected the defendants' reliance on the general warrant: "we can safely say there is no law in this country to justify the defendants in what they have done; if there was it would destroy all of the comforts of society." *Entick*, 95 Eng. Rep. at 817.

[4] These court-issued writs "empowered a customs officer to search any place on nothing more than his own (subjective) suspicion." M. Blane Michael, 85 N.Y.U.L. Rev. at 907-908.

In the debates over ratification of the new Federal Constitution, Antifederalists criticized the absence of such a protection, "sarcastically predict[ing] that the general, suspicionless warrant would be among the Constitution's 'blessings.'" *Maryland* v. *King*, 133 S. Ct. 1958, 1981 (2013) (Scalia, J., dissenting). "Patrick Henry warned that the new Federal Constitution would expose the citizenry to searches and seizures 'in the most arbitrary manner, without any evidence or reason.'" *Ibid.*

One pamphleteer, calling himself "Cato Uticensis," warned Virginia readers that if they approved the Constitution: "'you subject yourselves to see the doors of your houses them [*sic*] impenetrable Castles of freemen, fly open before the magic wand of an excisman.'" William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602-1791*, 677-678 (2009) (quoting Cato Uticensis, Virginia Independent Chronicle, Oct. 17, 1787, at 1). "The magnitude of [the] publicity" regarding inclusion of an express prohibition on general warrants "indicated the emergence of a consensus for a comprehensive right against unreasonable search and seizure." *Id.* at 686.

By 1789, James Madison had concluded that the new Constitution should be amended to include protection of "essential rights," including providing "security against general warrants." Letter from James Madison to George Eve (Jan. 2, 1789); see also *King*, 133 S. Ct. at 1981 (Scalia, J., dissenting) (explaining that "Madison's draft of what became the Fourth Amendment answered" the Antifederalists' concerns about the lack of any constitutional protection against general warrants). That protection, subsequently embodied in the Fourth Amendment, was deemed "indispensable to the full enjoyment of the

rights of personal security, personal liberty, and private property." 3 Joseph Story, *Commentaries on the Constitution of the United States: With a Preliminary Review of the Constitutional History of the Colonies and States, Before the Adoption of the Constitution* § 1895 (1833).

Given this history, it is not at all surprising that "when it comes to the Fourth Amendment, the home is first among equals." *Florida* v. *Jardines*, 569 U.S. 1, 6 (2013). As the Court has repeatedly held, "'[a]t the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Kyllo* v. *United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman* v. *United States*, 365 U.S. 505, 511 (1961)); see also *United States* v. *U.S. Dist. Court*, 407 U.S. 297, 313 (1972) ("physical entry of the home is the chief evil against which the Fourth Amendment is directed").

3. The Fourth Amendment's special solicitude for the home extends to its curtilage.

From the common law to today, the protection accorded to an individual's home has extended beyond the house itself to the surrounding property, known as the "curtilage." Indeed, this Court has recognized that the practice of treating the curtilage as part of the home is "'as old as the common law.'" *Jardines*, 569 U.S. at 6 (quoting *Hester* v. *United States*, 265 U.S. 57, 59 (1924)).

For example, the common law categorized as burglary the entry by intruders onto any "parcel of the mansionhouse," because "the capital house protects and privileges all its branches and appurtenants, if within the curtilage or homestall." 4 Wil-

liam Blackstone, *Commentaries on the Laws of England* *225 (1769). It was a "'sacred'" principle that "'no man can set his foot on his neighbour's close without his leave.'" *Jardines*, 569 U.S. at 8 (quoting *Entick*, 95 Eng. Rep. at 817). The curtilage is "intimately linked to the home, both physically and psychologically." *Jardines*, 569 U.S. at 6.

Because the curtilage is viewed as part and parcel of the home, courts "regard the area 'immediately surrounding and associated with the home' * * * as 'part of the home itself for Fourth Amendment purposes.'" *Ibid.* (quoting *Oliver* v. *United States*, 466 U.S. 170, 180 (1984)).

4. Protection of the home is an example of the Fourth Amendment's broad protection of private property against unjustified government intrusion.

The Fourth Amendment's protection of the home and curtilage is the most robust example of the Amendment's general protection of private property against incursions by the government.

The Court has explained, "[t]he text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to 'the right of the people to be secure against unreasonable searches and seizures'; the phrase 'in their persons, houses, papers, and effects' would have been superfluous." *United States* v. *Jones*, 565 U.S. 400, 405 (2012). For that reason, "[the Court's] Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century." *Ibid.*

It continues to be true that Fourth Amendment protection is triggered by "government trespass upon the areas ('persons, houses, papers, and effects') [the Amendment] enumerates." *Id.* at 406. "[T]he law of property 'naturally enough influence[s]' our 'shared social expectations' of what places should be free from governmental incursions." *Jardines*, 569 U.S. at 13-14 (Kagan, J., concurring) (quoting *Georgia* v. *Randolph*, 547 U.S. 103, 111 (2006).

"[P]roperty rights are not the sole measure of Fourth Amendment violations," but the Court's adoption of the "reasonable expectation of privacy" standard did not "snuf[f] out the previously recognized protection for property." *Soldal* v. *Cook County*, 506 U.S. 56, 64 (1992); see also *Minnesota* v. *Carter*, 525 U.S. 83, 88 (1998) (defining the "reasonable expectation of privacy" triggering Fourth Amendment protection as an expectation "that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society" (internal quotation marks omitted)); *United States* v. *Knotts*, 460 U.S. 276, 286 (1983) (reaffirming the principle "that, when the Government does engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment") (Brennan, J., concurring in judgment) (emphasis omitted).

Indeed, the *Jones* Court rested its decision on this ground, holding that the Fourth Amendment's protections applied because "[t]he Government physically occupied private property"—the car to which it

attached a beeper—"for the purpose of obtaining information." 565 U.S. at 404.

The Amendment's protection of the home is thus one example—albeit the most important example—of its general protection of private property against unjustified government intrusions.

B. Warrantless searches of vehicles parked on curtilage would seriously erode the Fourth Amendment's protection of the home.

The Court has explained that "an officer's leave to gather information is sharply circumscribed when he steps off[] thoroughfares and enters the Fourth Amendment's protected areas." *Jardines*, 569 U.S. at 7. Warrantless searches of vehicles parked in a driveway or on another part of a home's curtilage—indisputably the Fourth Amendment's most protected areas—would violate this principle.

First, allowing such warrantless searches would permit government officials to intrude into a home and its surroundings any time they have probable cause to suspect that a vehicle parked on the curtilage contains contraband or other evidence of crime. That result is fundamentally incompatible with the Fourth Amendment's "particular concern for government trespass," *Jones*, 565 U.S. at 406, that infringes on basic property and privacy rights. Far from guarding against the "physical entry of the home"—the central concern of the Fourth Amendment—such an approach would open the door to that "chief evil." *United States District Court*, 407 U.S. at 313.

This Court has repeatedly recognized that when otherwise permissible government intrusions occur

on the home or curtilage, heightened property and privacy interests require the government to obtain a warrant.

Thus, the Court held that a dog sniff on the curtilage constitutes a search under the Fourth Amendment, see *Jardines*, 569 U.S. at 11-12, despite reaching the opposite conclusion for dog sniffs of luggage at the airport, *United States* v. *Place*, 462 U.S. 696 (1983), or vehicles lawfully stopped on the highway, *Illinois* v. *Caballes*, 543 U.S. 405 (2005).

The Court similarly held that use of a beeper to monitor the movement of a container of chemicals in an individual's residence was a Fourth Amendment search, *United States* v. *Karo*, 468 U.S. 705 (1984), even though such monitoring does not constitute a search when confined to public places, as in *United States* v. *Knotts*, *supra*.

In *California* v. *Greenwood*, 486 U.S. 35 (1988), this Court was careful to restrict its holding to the claim that there is no reasonable expectation of privacy in "garbage left for collection *outside the curtilage of a home*." *Id.* at 37 (emphasis added).

Although the Court has not squarely addressed the question in the vehicle context, it has come close to endorsing the same conclusion. Thus, a plurality refused to uphold the warrantless search of a vehicle parked at a home in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). And the Court in *California* v. *Carney* stated that justifications underlying the automobile exception apply "[w]hen a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place *not regularly used for residential purposes*." 471 U.S. 386, 392-93 (1985) (emphasis added).

As with other intrusions into the home and its surroundings, permitting warrantless searches of vehicles parked at home is fundamentally incompatible with the Fourth Amendment's special solicitude for the privacy of the home.

Second, the diminution of property and privacy rights would not be limited to the search of the vehicle. The plain view doctrine permits officers to seize an item that is in plain view provided that (1) they observe it from a lawful vantage point; (2) they have a right of physical access to it; and (3) it is immediately apparent to him that it is contraband or a fruit, instrumentality, or evidence of a crime. *Horton* v. *California*, 496 U.S. 128, 136-137 (1990).

Allowing officers to enter the curtilage without a warrant radically extends officers' lawful vantage point over the curtilage and expands their right of access to it, thus greatly enabling their ability to seize items of personal property under the plain view doctrine. The right to be secure in one's home would have "little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity." *Jardines*, 569 U.S. at 6.

Third, there is no logical justification for distinguishing vehicles from other containers or structures on the curtilage. The Court has explained that "curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *United States* v. *Dunn*, 480 U.S. 294, 301 (1987).

A vehicle parked on the curtilage satisfies each of these criteria. It is virtually always proximate to the home—in a driveway or garage. The vehicle itself is an enclosure, often used to store personal items. And the vehicle's contents generally are not visible to passers-by.

Indeed, that is the conclusion reached by the plurality in *Coolidge*: "If we were to accept [the] view that warrantless entry for purposes of arrest and warrantless seizure and search of automobiles are *per se* reasonable, so long as the police have probable cause, it would be difficult to see the basis for distinguishing searches of houses and seizures of effects. * * * If the police may, without a warrant, seize and search an unoccupied vehicle parked on the owner's private property, not being used for any illegal purpose, then it is hard to see why they need a warrant to seize and search a suitcase, a trunk, a shopping bag, or any other portable container in a house, garage, or back yard." 403 U.S. at 479-80 (plurality opinion).

C. The justifications underlying the Automobile exception do not apply when a vehicle is parked on the curtilage.

The automobile exception rests on two justifications: a reduced expectation of privacy stemming from pervasive regulation and the inherent mobility of automobiles. *Carney*, 471 U.S. at 392-393. Neither rationale applies to vehicles parked at home.

1. An individual may have a reduced expectation of privacy in a vehicle when it is on the road—because of the many regulatory requirements that apply and can be enforced by police officers. See *South Dakota* v. *Opperman*, 428 U.S. 364, 368 (1976)

("[a]s an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order").

But, for the reasons already discussed, there is no such reduced expectation when a vehicle is parked at home. To the contrary, expectations of privacy are at their zenith at the home and its surroundings.

2. Nor does the inherent mobility justification apply to vehicles parked at the home.

That justification initially rested on a rationale tied to exigent circumstances. Thus, in *Carroll* v. *United States*, 267 U.S. 132 (1925)—the case in which the Court first recognized the automobile exception—the vehicle was in transit on the highway when the police spotted it. Its occupants could not have been arrested prior to the search, making it impossible for the police to stop them from driving the vehicle out of the jurisdiction. *Id.* at 169. The Court explained that it is not practicable to secure a warrant when "the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Id.* at 153.

Since *Carroll*, however, the Court has appeared to sever the mobility justification from any requirement of exigency. *Maryland* v. *Dyson*, 527 U.S. 465, 466 (1999) ("the 'automobile exception' has no separate exigency requirement"); *Chambers* v. *Maroney*, 399 U.S. 42 (1970) (holding that a car's inherent mobility justified the police in seizing it, moving it to the police station, and searching it there without a

warrant, even though its occupants were in custody at the time).

Indeed, the Court has recognized that even though the original justification for the exception "was the [automobile's] vagrant and mobile nature," subsequent warrantless searches were upheld in cases in which mobility was "remote, if not nonexistent." *Cady* v. *Dombrovski*, 413 U.S. 433, 441-442 (1973).

If the automobile exception no longer rests on a vehicle's mobility, and instead is justified entirely by reference to the reduced expectation of privacy, that justification does not apply to vehicles parked at the home—for the reasons already discussed.

If the automobile exception remains in some way related to mobility, that justification has little force with respect to a vehicle parked at home. Law enforcement officers can keep watch to ensure that the vehicle does not leave the home until they obtain a warrant. If it does exit the curtilage, the automobile exception would allow it to be searched.

Finally, to the extent the exception rests on the possibility of exigent circumstances, there is no basis for an exception to the warrant requirement decoupled from actual exigent circumstances. And where such circumstances are present, the existing exigent circumstances rule will allow the police to act.

The Court has steadfastly stood by the principle that—at least when it comes to the home and its surrounding curtilage—an exception to the warrant requirement demands a genuine exigency. "[W]arrants are generally required to search a person's home or his person unless 'the exigencies of the situation'

make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey* v. *Arizona*, 437 U.S. 385, 393-394 (1978) (quoting *McDonald* v. *United States*, 335 U.S. 451, 456 (1948)).

The *Mincey* Court declined to create a general "murder scene exception" to the warrant requirement, rejecting the idea that "the seriousness of the offense under investigation itself creates exigent circumstances of the kind that under the Fourth Amendment justify a warrantless search." *Id.* at 394. Similarly, this Court has declined to create a blanket exception for warrantless searches of the home for narcotics based on the fact that they are "easily removed, hidden, or destroyed," insisting that warrantless searches for narcotics must still be justified on a case-by-case basis by genuinely exigent circumstances. *Vale* v. *Louisiana*, 399 U.S. 30, 34 (1970).

Here, as in other contexts, "the availability of the exigent circumstances exception" assures that the warrant requirement does not undermine critical law enforcement needs. *Riley* v. *California*, 134 S. Ct. 2473, 2494 (2014).

At common law, there were a few limited circumstances in which no warrant was required for the search of the home or its curtilage, all of which involved restraining a dangerous person. One such example was for constables or other officers in hot pursuit of a criminal known to have committed an offense so serious as to breach the King's peace. Laura K. Donohue, *The Original Fourth Amendment*, 83 U. Chi. L. Rev. 1181, 1222-1223 (2016).

Relatedly, officers, witnesses, or people responding to "hue and cry" could break down doors of any

home in which the felon breaching the King's peace hid, and seize any items there. Constables could also enter a home without a warrant to break up a fight or keep the peace. *Id.* at 1230 (citing 2 Matthew Hale, *Historia Pacitorum Caronae* 95 (1736)).

Modern doctrine recognizes several of the same situations as exigent circumstances. For example, hot pursuit is still an exigent circumstance that may justify warrantless intrusion into the home. *United States* v. *Santana*, 427 U.S. 38, 42 (1976). Officers may also enter a home without a warrant to aid an individual who may be hurt in a brawl inside. *Brigham City* v. *Stewart*, 547 U.S. 398, 406-07 (2006).

This Court has also come to consider the imminent removal or destruction of evidence as another exigent circumstance justifying a warrantless search. In *Ker* v. *California*, the Court affirmed a warrantless search based on officers' fears that evidence in the form of narcotics was about to be destroyed. 374 U.S. 24, 42 (1963) (plurality opinion). This Court has however repeatedly reasserted that the removal or destruction of evidence must be "imminent" to justify bypassing the warrant requirement. *Missouri* v. *McNeely*, 569 U.S. 141, 168 (2013) (Roberts, C.J., concurring in part and dissenting in part). The Court has framed its imminence requirement in no uncertain terms: "[w]here there are exigent circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime, it is reasonable to permit action without prior judicial evaluation." *Roaden* v. *Kentucky*, 413 U.S. 496, 505 (1973). In other words, the *mere possibility* that evidence may be removed or destroyed is insufficient to displace the warrant requirement.

These existing exigency exceptions encompass all instances in which the mobility of a vehicle parked on the curtilage presents a genuinely pressing enforcement challenge. Like any other structure located on the curtilage, a vehicle may be searched without a warrant if the vehicle's mobility creates one of the established exigencies the Court has recognized.[5]

Concerns about urgent law enforcement imperatives therefore provide no basis for a rule broadly permitting warrantless searches of vehicles parked at home.

CONCLUSION

The judgment of the Supreme Court of Virginia should be reversed.

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[5] Pursuit was the basis for the Court's decision in *Scher* v. *United States*, 305 U.S. 251 (1938). The police were in pursuit of the car that was searched—and in addition the search was justified as incident to arrest. *Id.* at 253, 255; see also *Coolidge*, 403 U.S. at 459 n.17 (plurality opinion).

Respectfully submitted.

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No. 16-1027

IN THE

Supreme Court of the United States

RYAN AUSTIN COLLINS, *Petitioner*,

v.

COMMONWEALTH OF VIRGINIA, *Respondent*.

On Writ of Certiorari
to the Supreme Court of Virginia

Brief *Amicus Curiae* of Conservative Legal Defense and Education Fund, United States Justice Foundation, Downsize DC Foundation, DownsizeDC.org, Restoring Liberty Action Committee, Gun Owners Foundation, Gun Owners of America, Inc., Citizens United Foundation, Citizens United, The Heller Foundation, and Policy Analysis Center in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

Conservative Legal Defense and Education Fund, United States Justice Foundation, Downsize DC Foundation, Gun Owners Foundation, Citizens United Foundation, The Heller Foundation, and Policy Analysis Center are nonprofit educational and legal organizations, exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). DownsizeDC.org, Gun Owners of America, Inc., and Citizens United are nonprofit social welfare organizations, exempt from federal income tax under IRC section 501(c)(4). Restoring Liberty Action Committee is an educational organization. These organizations were established, *inter alia*, for purposes related to participation in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

These *amici* have been active in the protection of the Fourth Amendment. Many of these *amici* filed two *amicus* briefs in this Court in United States v. Jones, as well as filing the only *amicus* brief in support of the petition for certiorari in this case.[2]

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[1] It is hereby certified that counsel for the parties have consented to the filing of this brief; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

[2] Brief *Amicus Curiae* of United States Justice Foundation, *et al.* in Collins v. Virginia (Mar. 27, 2017).

SUMMARY OF ARGUMENT

Petitioner's brief presents a compelling argument as to why the so-called "automobile exception" should not be permitted to trump the Fourth Amendment's protections of the home and its curtilage in this case. In reality, though, no judicially created "exception" should be permitted to trump any of the Fourth Amendment's protections. Yes, the home is "first among equals," but "persons," "papers," and "effects" are just that — equals — and thus equally deserving of this Court's protection.

Over several decades, this Court's automobile exception has been invoked to allow the Government to run roughshod over Fourth Amendment protections. In this case, Virginia's highest court has permitted an exception that applies to an automobile to become an exception that now permits the police to search and seize without a warrant any "person," "house," "paper," or "effect," if in the vicinity of an automobile — or a motorcycle.

In 1985, this Court took a pragmatic approach to the Fourth Amendment in California v. Carney — applying the automobile exception based on the perceived needs of 20th century law enforcement to carve out an exception to the Fourth Amendment's warrant requirement carefully crafted in the 18th century. Relying on an atextual "expectation of privacy" standard, this Court labored to make it easier for the police to do their job, disregarding the important limitations imposed on the Government by the framers and the people in the U.S. Constitution.

In 2012, however, this Court rejected the primacy of the "expectation of privacy" analysis in Fourth Amendment cases, returning to First Principles in United States v. Jones. There, the Court faithfully applied the Constitution's unchanging 18th century principles to a 21st century problem — and established that the Fourth Amendment's protections apply just as strongly today as they did when adopted. Then, this Court protected an automobile — an "effect" — from warrantless interference of the police in placing a GPS device, based on the common-law trespass rule, which is equally protective of real property and personal property, including automobiles, which have already been deemed to be "effects."

Although at one time at common law "immoveable" property was often given greater protection than "moveable" property, no such distinction existed by 1766 when Blackstone wrote his Commentaries. There, he explained that both categories of property were "regard[ed] ... nearly, if not quite, equal...." This Court recognized in Jones, and the next year reiterated in Florida v. Jardines, that its "reasonable-expectation-of-privacy" test must not be allowed to displace or diminish the common-law trespassory test that long preceded it.

At each stage of this litigation, Petitioner has made a Jones-based property argument — that, by entering the curtilage of his home and rummaging around therein, the police violated the Fourth Amendment's property rights "baseline." The trial court did not understand this argument, the Court of Appeals dismissed it without serious consideration,

and the Supreme Court of Virginia ignored it. Hoping for a similar result, the Government has attempted to divert the focus of this Court from the central Fourth Amendment property issue. It is now the duty of this Court to restore order in Virginia and again demand the Fourth Amendment as written be honored by the Government.

ARGUMENT

I. THE AUTOMOBILE EXCEPTION CONFLICTS WITH FOURTH AMENDMENT PROPERTY RIGHTS.

A. Automobiles and Other Moving Vehicles Are Protected Fourth Amendment "Effects."

In his Summary of Argument, Petitioner contends that the Virginia Supreme Court erred in adopting "a 'bright-line' rule that the automobile exception trumps the Fourth Amendment protections for the home and curtilage." Brief for Petitioner ("Pet. Br.") at 8. These *amici* agree. As Petitioner points out, "[t]he Fourth Amendment presumptively requires a warrant to search a home" including "the curtilage, which is 'part of the home itself for Fourth Amendment purposes.'" Pet. Br. at 8 (citing Florida v. Jardines, 569 U.S. 1, 6 (2013)). In fact, this same presumption should apply equally to "persons ... papers, and effects...."

To be sure, Jardines acknowledges "when it comes to the Fourth Amendment, the home is first among equals" (*id.* at 6) — as Petitioner avers (Pet. Br. at 10)

and as the constitutional text attests. *See* United States v. Jones, 565 U.S. 400, 404-05 (2012). However, in Jones, the Court emphasized that the Fourth Amendment protects "private property" generally, spelling out four independent categorical property interests, none of which is less important than another. *See id.* at 404.

Even more aptly here, the Jones Court specifically ruled that "[i]t is beyond dispute that a vehicle is an 'effect' as that term is used in the Amendment."[3] *Id.* at 404. At issue in Jones was whether it was permissible for the Government to conduct a warrantless search by attaching a GPS device to an automobile. Unhesitatingly, the Court ruled in the negative, without voicing any regard for the fact that the tracking device was being used "to monitor the vehicle's movements on public streets." *Id.* at 402. Without discussing the "automobile exception," the Court ruled that the Government's intrusion on Jones's vehicle violated the Fourth Amendment's "common-law trespass" rule, which is equally protective of personal and real property. *Id.* at 404-05.

Just as there is no modifier limiting "houses," there is no modifier attached to "persons," "papers," or "effects." Whatever presumption applies to "houses" should apply to the others. Indeed, the Jones Court ruled, the "text of the Fourth Amendment reflects its close connection to property," and the common law of trespass, whether applied to real property or personal

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[3] *See* Pet. Br. at 26.

property, would offer the same constitutional protection. *Id.* at 405. As Petitioner contends here, the automobile exception not only "trumps Fourth Amendment protections for the home and curtilage" (Pet. Br. at 1), but also erases the Amendment's warrant protection of an important category of "effects" just because, in the Court's eyes, motor vehicles are "readily mobile," offering only a "fleeting" target for a constitutionally valid search. *See* California v. Carney, 471 U.S. 386, 390-91 (1985).

B. The Automobile Exception Is Based on the Erroneous Claim that Readily Mobile "Effects" Deserve Less Fourth Amendment Protection.

As pointed out by Petitioner, the Supreme Court explained in Carney that the automobile exception is supported by two rationales. Pet. Br. at 18. First, the Court stressed that the automobile's intrinsic "ready mobility" necessitated less Fourth Amendment protection because, as a practical matter, the automobile "'creates circumstances of such exigency that ... rigorous enforcement of the warrant requirement is impossible.'" Carney at 391. Second, the Court added, "'less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office.'" *Id.* at 391.

Throughout his brief, Petitioner has ably argued that neither of these rationales supports the application of the automobile exception to the facts of this case. *See* Pet. Br. at 10-38. Although this Court

could readily reverse with a decision limited to the facts of this case, these *amici* urge this Court to fully implement the venerable Fourth Amendment property principles recently rediscovered and restored to their rightful place in Jones and Jardines. Although Petitioner rightly argues that, like Jardines concerns the Fourth Amendment's protection of his property interest in the curtilage of the home (*see* Pet. Br. at 8-15 and 33-37), he does not focus on the Jones ruling upon which Jardines rests. *See* Pet. Br. at 26 and 36. A careful examination of both Jones and Jardines now reveals that both rationales upon which this Court has relied to support the automobile exception conflict directly with the property principles laid down and applied in those two watershed cases.

As the 1985 Carney Court explained, the automobile exception did not originate with an examination of the Fourth Amendment text, but grew out of a series of cases wherein the Court had grafted into the text an exception on the pragmatic ground that the "ready mobility" of the automobile would make it too difficult for the Government to enforce the law and at the same time conform its action to the Constitution's warrant requirement. *See* Carney at 390-91.

In Jones, the Court took a very different approach, beginning and ending its analysis with First Things — the original meaning of the Fourth Amendment text. *See* Jones at 404. To that end, Justice Scalia noted that the Government had, by the installation of the GPS device on a privately owned motor vehicle, "physical[ly] intru[ded]" upon the owner's private

property which "would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." *Id.* at 404-05. And it was that original meaning of the Fourth Amendment that controlled the installation of the GPS device, not the felt necessities of modern law enforcement.

The contrast of methodology and constitutional philosophy between the 1985 Carney Court and the 2012 Jones Court could not be more stark. The Carney majority focused on tailoring a late 18th century covenant protecting individual rights, trimming it to fit the current policy preferences of law enforcement. The Jones majority focused on the judicial task of applying the permanent principles as written in a 1791 text to modern law enforcement technological developments. In 2012, the Constitution-as-it-was-written won out, restoring "Fourth Amendment jurisprudence [to its historic] tie[] to common-law trespass." Jones at 405. So after Jones, the threshold inquiry is an historic one, a search for the original principles embraced by the text of the Fourth Amendment.[4] According to Jones, for most of our history, the Fourth Amendment was understood to embody an aversion for government trespass upon the areas ("persons, houses, papers, and effects") it enumerates. *Id.* at 405.

If the automobile exception is to be justified according to the property principle embraced in Jones,

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[4] *See* H. Titus and W. Olson, "U.S. v. Jones: Reviving the Property Foundation of the Fourth Amendment," 3 CASE W. RES. JOURNAL OF LAW, TECHNOLOGY & INTERNET 243 (Jan. 2013).

there must be evidence in the common law at the time of the founding of a principled distinction between "moveable" and "immoveable" property. No such evidence has been offered. Rather, there is excellent authority to support the absence of such a distinction.

In his chapter on the rights of things personal, Blackstone introduces his topic with the observation that there was a time when "things *moveable* [were] not [as] esteemed [as] things that are in their nature more permanent and *immoveable*," but that those days had faded, and by the 18th century Blackstone could write that there was ample evidence of comparability between the "more permanent and *immoveable*, as lands, and houses" and "all a man's goods and chattels":

> since the introduction and extension of trade and commerce, which are entirely occupied in this species of property, and have greatly augmented it's quantity and of course it's value, we have learned to conceive different ideas of it. Our courts now regard a man's personalty in a light nearly, if not quite, equal to his realty.... [2 W. Blackstone, Commentaries on the Laws of England, 384-85 (U. Chi. Facs. ed. 1766).]

Elaborating further, Blackstone explained that:

> Chattels personal are, properly and strictly speaking, things *moveable;* which may be annexed to or attendant on the person of the owner, and carried about with him from one

> part of the world to another. Such are animals, household-stuft, money, jewels, corn, garments, and every thing else that can properly be put in motion, and transferred from place to place. [*Id.* at 387.]

Although there was a categorical distinction at common law between immoveable real property, including "houses," and moveable things, such as "papers" and "effects," the common law of trespass applied to them both. And, as Jones declared, since "our Fourth Amendment jurisprudence has been tied to common-law trespass, at least until the latter half of the 20th century," it was time to return to the constitutional text which made no distinction between moveable and immoveable property, treating "persons, houses, papers, and effects" as equally protected from unreasonable searches and seizures.

Applying the Fourth Amendment and the Jones decision to a search of email attachments (*i.e.*, digital papers and effects), then-Judge Gorsuch explained: "the warrantless opening and examination of (presumptively) private correspondence that could have contained much besides potential contraband for all anyone knew ... seems pretty clearly to qualify as exactly the type of trespass to chattels that the framers sought to prevent when they adopted the Fourth Amendment." United States v. Ackerman, 831 F.3d 1292, 1307 (10th Cir. 2016). And, as Justice Alito noted in his concurring opinion in Jones: "At common law, a suit for trespass to chattels could be maintained if there was a violation of 'the dignitary interest in the inviolability of chattels'...." Jones at 419, n.2 (Alito, J.,

concurring). Truly, adherence to Jones leaves no room for the automobile exception.

C. The Automobile Exception Cannot Be Justified by an Appeal to a "Lesser Expectation of Privacy."

As Petitioner points out in his brief, the Carney Court attempted to bolster the automobile exception by the proposition that, because "automobiles carry a lower expectation of privacy," the exception still applies, even if a particular motor vehicle is not "readily mobile." *See* Pet. Br. at 18. Petitioner rebuts the applicability of this rationale to the facts of this case involving a motorcycle parked within the curtilage of a home in which the owner has a high expectation of privacy. *See, e.g.*, Pet. Br. at 15-16. In reality, though, the Jones property principle does not require the Court even to reach the privacy issue.

In Jones, Justice Scalia devoted a good portion of the Court's opinion to establishing that the Court's "reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." Jones at 409. And, as Justice Sotomayor explained further in her concurrence, this Court acknowledged that "the Fourth Amendment is not concerned only with trespassory intrusions on property" (*id.* at 414):

> Rather, even in the absence of a trespass, "a Fourth Amendment search occurs when the government violates a subjective expectation of

> privacy that society recognizes as reasonable." [*Id.*]

Thus, Justice Sotomayor concluded, the Court's "reasonable-expectation-of-privacy test **augmented**, but did not displace or diminish, the common-law trespassory test that preceded it." *Id.* (emphasis added). Yet that is exactly what the automobile exception has done, and more particularly did here — negating the common-law trespassory test as applied to a motorcycle, an "effect" in its own right, and therefore, within the protective shield of the Amendment.

In Jardines, decided a year after Jones, the Court took the opportunity to reaffirm the primacy of the property principle established in Jones. It declined to consider the Florida government's argument that the Fourth Amendment was not violated because the use of a dog to investigate the curtilage of a home does not implicate any "legitimate privacy interest[s]." *Id.* at 10. In explanation, the Court reiterated what it had previously stated in Jones, that the reasonable-expectation-of-privacy test may "add" but "not subtract anything from the Amendment's protections 'when the Government *does* engage in [a] physical intrusion of a constitutionally protected area.'" Jardines at 5.

In short, Jones and Jardines preclude not just the application of the automobile exception in this case, but also preclude the application of that exception in every case because the exception's very design and effect is to "lessen" the Fourth Amendment protection against warrantless searches of automobiles. In every

such case, the automobile exception would undermine the "Fourth Amendment's property-rights baseline." Jardines at 11.

II. THIS CASE REQUIRES THE COURT TO RE-EVALUATE THE AUTOMOBILE EXCEPTION.

A. This Case Cannot Be Decided without Application of Jones and Jardines.

No doubt, the Government very much would like this Court to resolve this case as though it were just another "reasonable expectation of privacy" case involving the "automobile exception." That approach might allow the Court to sanction the warrantless police search of the curtilage of the home, without the need to resort to the Fourth Amendment. Both the "reasonable expectation of privacy" test and the "automobile exception" are atextual — invented out of whole cloth by the Judiciary. Applying that exception, this Court could simply declare, as the court below did, that Mr. Collins had "no reasonable expectation of privacy in a vehicle parked on private property yet exposed to public view" (Collins v. Virginia, 790 S.E.2d 611, 619 (Va. 2016)) and, for that reason, the Fourth Amendment simply does not apply. Using those tests, the Court would not only bypass the text of the Fourth Amendment, but also ignore its context, its purpose, and its common-law foundation. Rather than applying the law of the Constitution, this Court could, as in the

days of the book of Judges, simply do what it feels is right in its own eyes.[5]

But this is not a case that can be resolved based on atextual "expectation of privacy" grounds. And prior "automobile exception" cases cannot be applied mechanically to this case, as if that decades-old exception exists in its own cocoon, and as though this Court's historic return to the property foundation of the Fourth Amendment had not occurred. The truth is that Jones and Jardines, have dramatically changed the legal landscape of the Fourth Amendment, particularly as it applies to intrusions onto real property.

As these *amici curiae* noted in their earlier *amicus* brief filed in support of Collins' Petition for Certiorari, Petitioner advanced a well-grounded, property-based argument in the trial court, expressly and specifically relying on both Jones and Jardines. Thereafter, Petitioner forcefully made the same argument to the Virginia Court of Appeals, to the Supreme Court of Virginia, and now to this Court. As *amici* detailed, the trial court misunderstood Jones and Jardines, the Court of Appeals casually dismissed those cases as irrelevant, and the Supreme Court of Virginia ignored them completely.[6] *See Amicus* Br. of USJF, *et al.* in Support of Pet. for Cert. at 8-9.

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[5] "In those days there was no king in Israel: every man did that which was right in his own eyes." Judges 21:25.

[6] The Virginia Supreme Court did cite Jardines in a footnote. *See* Collins at 623 n.4.

Petitioner has now, again, raised a separate and independent property-based argument to this Court. *See* Pet. at i, 10, 16-17; *see also* Pet. Br. at 13-14, 35-36. In its Brief in Opposition to the Petition for Certiorari, the Government attempted to rephrase the question presented to omit any reference to "private property." Brief in Opposition at i. Then, like the Supreme Court of Virginia below, the Government's brief did not even address the property issue, only citing Jones and Jardines once each in passing footnotes, without any description or application of those decisions, or any analysis of their application to this case.[7]

The lower courts and the Government have chosen simply to ignore Petitioner's property-based Fourth Amendment argument, perhaps not favoring the result that such a property-based analysis clearly would require, and instead hoping the foundational issue will simply pass unnoticed. It is now this Court's responsibility to faithfully apply the property rights "baseline" established in Jones and Jardines to the facts of this case, which requires a re-examination of the automobile exception.

Understanding this Court's rationale for its automobile exception is like playing a game of Whack-

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[7] But as *amici* noted previously, "how can a court decide a Fourth Amendment case about automobiles, and completely ignore Jones? And how can it decide such a case about the curtilage of a home, without even discussing Jardines?" *Amicus* Br. of USJF, *et al.* in support of Pet. Cert. at 9.

A-Mole.[8] Whenever one justification is knocked down, another pops up to take its place. *See Amicus* Br. of USJF, *et al.* in Support of Pet. for Cert. at 18, *et seq.* After years of continual expansion and pervasive application of the automobile exception, "[t]he word 'automobile'" today has become precisely what this Court promised it would not — "a talisman in whose presence the Fourth Amendment fades away and disappears." Coolidge v. New Hampshire, 403 U.S. 443, 461 (1971). This case is the most recent — and the most strained — attempt to invoke the automobile exception to circumvent the most central protections offered by the Fourth Amendment. As Petitioner puts it, "[e]ssentially, the [lower] court held that the automobile exception trumps Fourth Amendment protections for the home and curtilage." Pet. Br. at 1.

As these *amici* discussed at the petition stage, the most recent iterations of the automobile exception revolve around the notion that a person has a reduced expectation of privacy in a vehicle in a public place. *See* South Dakota v. Opperman, 428 U.S. 364 (1976). Although a person may have a reduced expectation of privacy in his car being driven on the public streets, Jones made clear that his property rights are the same wherever he or his car is located — the police may not search or seize it without a warrant simply because it is in a place accessed by the public. In that sense, the automobile exception undermines the property rights baseline — as it was applied not just by the Supreme Court of Virginia, but also across the board. The

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[8] https://www.youtube.com/watch?v=D0n8N98mpes.

automobile exception should be declared not just "merely dead," but "really, most sincerely dead."[9]

B. The Automobile Exception Cannot Be Applied to Override Fourth Amendment Protections.

The Supreme Court of Virginia below applied the automobile exception to a vehicle located on private property based on a theory of what this Court has **not** done. The court below noted that this Court has "never limited" the automobile exception and its past cases "'did not distinguish'" between public and private spaces. *See* Pet. Br. at 7-8. Of course, the fact that a 10-year-old's parents have not specifically prohibited him from borrowing his dad's Harley would be a poor argument that it is permissible to do so.

Although it is true that this Court has said the automobile exception permits the police to search a vehicle without a warrant in some circumstances, it certainly has never approved of an accompanying trespass onto and search of the curtilage of a **house**. *See* Pet. Br. at 9-10. Similarly, even if the police had the authority to search a vehicle parked in a public lot, that would not give them permission to frisk the owner's **person** for his keys when he returns with his groceries. Nor would the automobile exception give the police permission to rummage through his **papers and effects** hoping to find a keycode, if the vehicle were parked, for example, behind a gated fence at an

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[9] *See* Wizard of Oz, https://www.youtube.com/watch?v=PHQLQ1Rc_Js.

office building or storage unit. The Supreme Court of Virginia's theory seems to be that the automobile exception can be used to excuse the police from obtaining a warrant before they violate anything or anyone that stands in the way of getting at the vehicle to be searched. Viewed in that way, the "automobile exception" is not a "narrow exception" to the warrant requirement, but rather a death blow to the warrant requirement whenever an automobile is in the vicinity.

Of course, a warrant is not simply about requiring a showing of probable cause. Rather, the police must also specify the place to be searched and the things to be seized. The purpose of a warrant, then, is to restrict the Government from going beyond the scope of that for which probable cause exists, such as occurred in this case. By eliminating the warrant requirement any time an automobile is involved, the Supreme Court of Virginia has removed an important limitation on police activity. Whereas applying for a warrant requires the Government to announce its legal and factual theory and establishes a prior commitment, the absence of a warrant absolves the Government from being pinned down in any way and, if needed, permits the police to say whatever is required to justify their actions after they have finished searching and seizing.

Moreover, the automobile exception has given law enforcement officials a dangerous tool to employ that jeopardizes other protections in the Bill of Rights, including Second Amendment rights. For example, in Cady v. Dombrowski, 413 U.S. 433 (1973), the Court was confronted with the search of a heavily damaged

automobile that had been towed to a service station. The vehicle was not inherently mobile and, indeed, was obviously immobile. *Id.* at 435-37. However, the Court nevertheless assumed that there was still an exigency, since the police suspected the vehicle to contain a firearm, and alleged a search was necessary supposedly to "'protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands.'" *Id.* at 443. To justify the expansion of the automobile exception to apply to a situation where the automobile had no mobility, the Court invented a new justification — that automobiles and their drivers are heavily and pervasively regulated. *Id.* at 441. Writing for the majority, Justice Rehnquist admitted "that this branch of the law is something less than a seamless web," *id.* at 440, admitting that the Court had now expanded the automobile exception to cases where none of the original justifications existed. *Id.* at 442-43.

C. Probable Cause that the Motorcycle Was Contraband Does Not Obviate the Warrant Requirement.

The Government goes to great lengths to argue that the police officers had probable cause to believe that the motorcycle at Collins' house was stolen at the time they entered Collins' property to check the VIN. Br. in Op. at 2-4. The Government argues that the police, believing Collins' motorcycle to be contraband, had the absolute right to search the motorcycle, "'without more.'" *See* Maryland v. Dyson, 527 U.S. 465, 467 (1999). Of course, if the police had probable cause to believe a carport contained a stolen weed

whacker instead of a motorcycle, they would not be permitted to trespass and rummage around for it without first obtaining a warrant. Indeed, even if an item is contraband (as was Collins' bike), and even if it is in plain view (as Collins' bike may have been), the police still have no right to enter private property to search or seize it. As this Court has held, "not only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself."[10] Horton v. California, 496 U.S. 128, 137 (1990). Indeed, the Court has held that "even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure."[11] Coolidge v. N.H., 403 U.S. 443, 468 (1971).

Accordingly, it does not really matter whether the police had probable cause to believe the motorcycle was stolen (and thus was contraband), probable cause to believe it was the vehicle that had eluded them (and arguably an instrumentality), or both, as the Government argues. Br. in Opp. at 15. In each situation, it is not the illegal nature or use of a vehicle

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[10] As Petitioner makes clear in his brief, the police had no such lawful right. Pet. Br. at 13-14 (discussion of Jardines).

[11] The Government attempts to liken this case to New York v. Class, 475 U.S. 106 (1986) where this Court held that a VIN number is "ordinarily in plain view" and thus subject to no reasonable expectation of privacy. Class at 114. Of course, even though the officer may lawfully read the VIN number, he still "must also have a lawful right of access to the object itself." Horton at 137.

which permits the police to search and seize on private property — according to Horton and Coolidge — it is its vehicular nature. Indeed, it is the automobile exception itself that the Government argues permits it to dispense with the warrant requirement and enter the curtilage of a home and rummage around within.

CONCLUSION

For the foregoing reasons, the decision of the Virginia Supreme Court should be reversed.

Respectfully submitted,

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In The
Supreme Court of the United States

RYAN AUSTIN COLLINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF OF *AMICI CURIAE* FOURTH AMENDMENT SCHOLARS IN SUPPORT OF PETITIONER

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INTRODUCTION

The *amici curiae* submit this Brief in support of Petitioner, and urge the Court to reverse the decision of the Supreme Court of Virginia.

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are criminal procedure professors who teach, study, and write about the Fourth Amendment. *Amici* submit this brief in support of Petitioner's position that, notwithstanding the automobile exception, the Fourth Amendment is violated when, in the absence of exigent circumstances, a police officer enters a home's curtilage to conduct a warrantless, physical search of an unattended vehicle. No other brief submitted in this case considers the question of the erosive impact on the Court's traditional (trespass-based), Fourth Amendment interpretation if the automobile exception were held to automatically apply to vehicles parked within a home's curtilage.

[1] The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

SUMMARY OF ARGUMENT

The issue before the Court is whether the automobile exception to the Fourth Amendment's warrant requirement supports the search of an unattended vehicle parked within a home's curtilage, without a finding of exigency to justify the officer's warrantless entry onto the curtilage to conduct the physical search. The Virginia Supreme Court held that the automobile exception sufficed to support the officer's entry onto curtilage to perform a physical investigation of Petitioner's tarp-covered motorcycle. In upholding this warrantless search, the Virginia Supreme Court assumed that the automobile exception provided a per se warrant exception, even though the police investigation at issue was made possible only by a warrantless police entry onto a home's curtilage – the traditional basis of Fourth Amendment protection.

This case presents the Court with a critical crossroad in determining the Fourth Amendment's scope and applicability under the Court's trespass interpretation. In *Florida v. Jardines*, the Court made clear that a Fourth Amendment violation occurs if the government's warrantless conduct either (1) infringes on a person's reasonable expectation of privacy, or (2) involves a police investigation made possible by law enforcement's physical intrusion on a constitutionally protected area. *See* 569 U.S. 1, 11 (2013). Although *Katz*'s privacy-expectations test[2] and the trespass analysis come at the Fourth Amendment question from

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[2] *See Katz v. United States*, 389 U.S. 347, 351 (1967).

different angles, they both address the circumstances under which the Fourth Amendment protects a person from warrantless police conduct. Only now, since *United States v. Jones*[3] and *Jardines*, has the trespass basis of Fourth Amendment protection *reemerged* as an intact theory of Fourth Amendment protection – an interpretation that has substance and meaning, independent of *Katz*.

Since our nation's founding, in order for police to enter onto a person's homestead to conduct an investigation, the Fourth Amendment required law enforcement to have a warrant, consent, or exigent circumstances. *See Steagald v. United States*, 451 U.S. 204, 211 (1981). The automobile exception, as originally understood, required consideration, either explicitly or implicitly, of exigency to justify law enforcement's warrantless, probable cause-based search of a vehicle. After *Katz*, however, the Court recognized that there were commonalities involving vehicle travel that supported a per se warrant exception for the probable cause-based search of a vehicle, based upon generalizations regarding drivers' reduced expectation of privacy in vehicles and their public travels.

Amici argue that the automobile exception must not be used to *expand* the constitutional bases for warrantless, police entry onto a home's curtilage – i.e., beyond those involving consent (express or implied), exigent circumstances, or a warrant. Important here, the Court's decisions in *Jones* and *Jardines* have

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[3] *See* 565 U.S. 400 (2012).

undermined the Virginia Supreme Court's conclusions regarding the scope of the automobile exception.

The Fourth Amendment does not support applying the automobile exception – which *amici* argue here is a per se, *Katz*-based warrant exception – to a traditional, trespass-based search and seizure. To do so would erode the "irreducible constitutional minimum" protection guaranteed under the Fourth Amendment's original meaning. *Cf. Jones*, 565 U.S. at 414 (Sotomayor, J., concurring). In addition to producing the constitutional violation in this case, the Virginia Supreme Court's approach is problematic because it unnecessarily *reinjects Katz* into the Fourth Amendment's traditional interpretation.

For these reasons, the Court should reverse the decision of the Virginia Supreme Court, and hold that the automobile exception does not apply to a vehicle that is found, parked and unattended, within a home's curtilage, absent case-specific exigency to justify the officer's warrantless entry and search.

ARGUMENT

The issue before the Court is whether the automobile exception to the Fourth Amendment's warrant requirement supports the search of an unattended vehicle parked within a home's curtilage, without a finding of exigency to justify the officer's warrantless entry onto the curtilage to conduct the physical search. The Supreme Court of Virginia held that the automobile

exception, without more, sufficed to support the officer's entry onto curtilage to perform a physical investigation of Petitioner's tarp-covered motorcycle. *See Collins v. Commonwealth*, 790 S.E.2d 611, 616-17 (Va. 2016) ("[W]e do not find it necessary to independently assess whether exigent circumstances existed here. Rather, the facts of this case are more properly addressed by a different exception to the warrant requirement: the automobile exception."). In upholding this warrantless search, the Supreme Court of Virginia assumed that the automobile exception provided a per se, warrant exception,[4] even though the police investigation at issue was made possible only by a warrantless, police entry onto a home's curtilage – the traditional basis of Fourth Amendment protection.

This case presents the Court with a critical crossroad in determining the Fourth Amendment's scope and applicability under the Court's trespass interpretation. *Amici* urge caution in following the Virginia Supreme Court's chosen road, and argue against importing *Katz*-based, warrant exceptions into cases involving traditional, Fourth Amendment searches and seizures.

Since our nation's founding, in order for police to enter onto a person's homestead to conduct an investigation, the Fourth Amendment required law

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[4] *See id.* at 618 ("[W]e need not decide whether the motorcycle was immediately mobile at the precise moment of the search. The bright-line test does not require us to hypothesize whether it would have been technically possible for Collins to uncover the motorcycle, start the engine, and flee from Officer Rhodes.").

enforcement to have a warrant, consent, or exigent circumstances. *See Steagald v. United States*, 451 U.S. 204, 211 (1981); *see also Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978) ("[W]arrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment."). For decades after *Katz v. United States*,[5] the Fourth Amendment's trespass basis was *folded into Katz*'s privacy-expectations test, and seemingly ceased to exist as a separate theory of establishing Fourth Amendment protection. *See, e.g.*, *Oliver v. United States*, 466 U.S. 170, 183 (1984) ("The existence of a property right is but one element in determining whether expectations of privacy are legitimate. The premise that property interests control the right of the Government to search and seize has been discredited.") (internal quotation marks omitted).

But, as the Court made clear in *Florida v. Jardines*, the modern Court has not forgotten the Fourth Amendment's traditional roots and traditional interpretation. *See* 569 U.S. 1, 6 (2013) (rejecting as violating the Fourth Amendment a warrantless, canine sniff – performed at the front door of Jardines's suburban home

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[5] *See generally* 389 U.S. 347, 348, 353 (1967) (holding that the government's warrantless, electronic listening and recording of Katz's telephone conversations – which were overheard through a device attached to the outside of the public telephone booth where Katz made his calls – "violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment.").

– because, in obtaining the positive, canine sniff, the officers had "gathered . . . information by physically entering and occupying the area [i.e., the home's curtilage] to engage in conduct not explicitly or implicitly permitted by the homeowner."). After *Jardines*, a Fourth Amendment violation occurs if the government's warrantless conduct either (1) infringes on a person's reasonable expectation of privacy, or (2) involves a police investigation made possible by law enforcement's physical intrusion on a constitutionally protected area. *See id.* at 11 ("The *Katz* reasonable-expectations test has been *added to*, not *substituted for*, the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas.") (internal quotation marks omitted); *United States v. Ackerman*, 831 F.3d 1292, 1307 (10th Cir. 2016). Although these two theories come at the Fourth Amendment question from different angles, they both address the circumstances under which the Fourth Amendment protects a person from warrantless, police conduct. Only now, since *United States v. Jones*[6] and *Jardines*, has the trespass basis of Fourth Amendment protection *reemerged* as an intact theory of Fourth Amendment protection – an interpretation that has substance and meaning, independent of *Katz*.

And therein lies the problem with the Virginia Supreme Court's approach. The automobile exception did

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[6] *See* 565 U.S. 400 (2012).

not begin its journey as a per se, warrant exception. See *infra* Section II. As originally articulated, this warrant exception required consideration, either explicitly or implicitly, of exigency to justify law enforcement's warrantless, probable cause-based search of a vehicle. See *infra* Sections II, II.A. After *Katz*, however, the Court recognized that there were commonalities involving vehicle travel that supported a per se, warrant exception for the probable cause-based search of a vehicle, based upon generalizations regarding drivers' reduced expectation of privacy in vehicles and their public travels. See *id.* But it must not be forgotten that the original view of the automobile exception was different.

Amici argue that the Fourth Amendment does not support mechanically applying a per se, *Katz*-based warrant exception to a traditional, trespass-based search and seizure. To do so would erode the "irreducible constitutional[ly] minimum" protection guaranteed under the Fourth Amendment's original meaning. *Cf. Jones*, 565 U.S. at 414 (Sotomayor, J., concurring). In addition to producing the constitutional violation in this case, the Virginia Supreme Court's approach is problematic because it unnecessarily re-injects *Katz* into the Fourth Amendment's traditional interpretation. *See Jardines*, 569 U.S. at 11 (majority opinion) ("One virtue of the Fourth Amendment's property-rights baseline[7] [i.e., over the *Katz* test] is that it keeps easy cases easy."); *see infra* Sections I, I.A. This case

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[7] *See Jardines*, 569 U.S. at 11 (describing the trespass analysis as "the Fourth Amendment's property-rights baseline . . . .").

presents the Court with a critical crossroad because the outcome could signal whether the trespass-based interpretation of the Fourth Amendment retains its post-*Jardines*'s vitality – independent of *Katz*'s privacy-expectations test – or, instead, whether *Jardines*'s property-rights baseline is destined to become re-subsumed within *Katz*'s system of privacy-based warrant exceptions.

I. A Fourth Amendment "Search" Occurs When the Government's Warrantless Conduct *Either* Infringes On a Reasonable Expectation of Privacy *Or* Involves a Physical Intrusion (a Trespass) On a Constitutionally Protected Area to Perform an Investigation.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." U.S. Const. amend. IV. As originally interpreted, the Fourth Amendment's protections were tied to common-law trespass, and were limited to those areas enumerated in the Fourth Amendment itself. *See Kyllo v. United States*, 533 U.S. 27, 31 (2001). In *Silverman v. United States*, for example, the Court rejected as violating the Fourth Amendment the government's use of a "spike mike" – which was inserted "several inches into a party wall" until it touched a heating duct – to eavesdrop on the conversations of the premises' occupants. 365 U.S. 505, 506, 509-10 (1961) (emphasizing that the police investigation had been accomplished by an "unauthorized physical encroachment within a

constitutionally protected area," which was "beyond the pale" of earlier cases involving non-trespassory eavesdropping). And, for many years, the trespass theory was the "exclusive basis" for obtaining Fourth Amendment protection. *Jardines*, 569 U.S. at 5.

However, the trespass model proved inadequate in an increasing number of circumstances. Technology made it possible for police to intrude on a person's privacy *without* a predicate physical trespass. The Court responded to these changing societal circumstances in its pathmarking decision, *Katz v. United States*, declaring there that the Fourth Amendment "protects people, not places." 389 U.S. at 351 ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."). In so holding, *Katz expanded* the reach of Fourth Amendment protections to include warrantless police investigation that intruded upon a person's "constitutionally protected reasonable expectation of privacy." *See id.* at 360 (Harlan, J., concurring); *United States v. United States District Court*, 407 U.S. 297, 313 (1972) ("Our decision in *Katz* refused to lock the Fourth Amendment into instances of actual physical trespass."). For decades after *Katz*, the Court determined whether a place or a person's possessions or activities received Fourth Amendment protection based upon the reasonableness of the person's privacy expectation in that place, thing, or activity. *See, e.g.*, *Bond v. United States*, 529 U.S. 334, 338-39 (2000) (finding an objectively reasonable expectation of privacy in a bus passenger's carry-on luggage

– which was located in an overhead bin – because the agent palpated the bag in an "exploratory manner" that was more probing than other passengers would have touched the luggage).

Yet, the *Katz* test produced its own set of challenges. *Katz*'s privacy-expectations test was criticized for its lack of an objective yardstick by which to measure whether a person's privacy expectations were reasonable. *See Kyllo*, 533 U.S. at 34 ("The *Katz* test . . . has often been criticized as circular, and hence subjective and unpredictable."); *see also Jones*, 565 U.S. at 427 (Alito, J., concurring in judgment) ("[J]udges are apt to confuse their own expectations of privacy with those of the hypothetical reasonable person to which the *Katz* test looks."). Further, *Katz*'s adoption of a per se warrant requirement[8] led the Court to develop thereafter an "intricate body of law regarding 'reasonable expectation of privacy'" as a means of defining the Fourth Amendment's various warrant exceptions. *See California v. Acevedo*, 500 U.S. 565, 582-83 (1991) (Scalia, J., concurring in judgment) ("The victory [of a warrant requirement] was illusory. Even before today's decision, the 'warrant requirement' had become so riddled with exceptions that it was basically unrecognizable.").

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[8] *See Katz*, 389 U.S. at 357 ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well delineated exceptions.") (footnote omitted).

And, more importantly, *Katz* arguably failed to adequately protect against the very police conduct that gave rise to the Fourth Amendment – warrantless police trespass. In *United States v. Jones*, decided in 2012, the Court considered whether the government violated the Fourth Amendment when it installed, without a warrant, a Global-Positioning-System (GPS) tracking device onto the undercarriage of Jones's vehicle and used the device to monitor the car's movements for twenty-eight days. *See* 565 U.S. at 403 (majority opinion) (explaining also that a vehicle is an "effect" for Fourth Amendment purposes). The government in *Jones* argued that no warrant was required because, under *Katz*, Jones lacked an expectation of privacy in both the undercarriage of his vehicle and the vehicle's movements as it traveled on the open road. *See id.* at 406. But the Court refused to apply the *Katz* test, choosing instead to base its analysis on the warrantless, governmental trespass that made the GPS-tracking possible in the first place. *See id.* ("But we need not address the Government's contentions [i.e., that *Katz* was not violated], because Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation.").

Rather than applying *Katz*, *Jones* instead held that the Fourth Amendment had been violated under the traditional, trespass basis of Fourth Amendment protection. *See id.* at 404-05 ("The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment

when it was adopted."). As Justice Sotomayor explained in her separate *Jones* concurrence, the trespass test reflected "an *irreducible constitutional minimum*: When the Government physically invades personal property to gather information, a search occurs." *Id.* at 414 (Sotomayor, J., concurring) (emphasis added). She argued that applying *Katz* would "erode[] that long-standing protection . . . ." *Id.*

In *Jardines*, the Court elaborated on the trespass basis of Fourth Amendment protection. 569 U.S. 1 (2013). There, and without a warrant, police brought a drug-detection dog onto a home's curtilage – specifically, the home's front porch – in order to perform a drug-detection sniff of the air at the base of the front door. *Id.* at 4. *Jardines* described the case as "a straightforward one," and rejected the warrantless canine sniff as violating the Fourth Amendment because:

> The officers were gathering information in an area belonging to Jardines and immediately surrounding his house – in the curtilage of the house, which we have held enjoys protection as part of the home itself. And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner.

Id. at 5-6.

Jardines is also important because it illustrates the potential for *disagreement* in a case's outcome, depending on whether a court applies the trespass

test or, instead, *Katz*. Justice Scalia, writing for the *Jardines* majority, declined to apply *Katz* and concluded that, based upon a trespass analysis, the Fourth Amendment is violated "when the government uses a physical intrusion to explore details of the home (including the curtilage) . . . ." *See id.* at 11. Justice Kagan concurred to offer the observation, on behalf of two other Justices, that the outcome in *Jardines* would have been the *same* – i.e., that the warrantless canine sniff violated the Fourth Amendment – under both the trespass test and *Katz*. *See id.* at 12-13, 16 (Kagan, J., concurring) ("The Court today treats this case under a property rubric; I write separately to note that I could just as happily have decided it by looking to Jardines' privacy interests. A decision along those lines would have looked . . . well, much like this one.").

Justice Alito, on the other hand, dissented on behalf of three other Justices, to express his disagreement with the majority's use of a trespass analysis. *See id.* at 23 (Alito, J., dissenting) ("While the Court claims that its reasoning has 'ancient and durable roots,' its trespass rule is really a newly struck counterfeit."). And, important here, Justice Alito *also* disagreed with the concurrence's interpretation of *Katz*, in which Justice Kagan concluded that the Fourth Amendment was violated because Jardines had a reasonable expectation of privacy in the odors emanating from under his door. *See id.* at 24-25. Like the concurrence, Justice Alito applied *Katz* but found no Fourth Amendment violation because, he argued, "[a] reasonable person understands that odors emanating from a house may be

detected from locations that are open to the public. . . ." *See id.* at 17.

Therefore, the Fourth Amendment model used has consequences, some of which are pragmatic. *Katz*'s privacy-expectations analysis is necessarily less black-and-white than the trespass test because *Katz* seeks to measure the privacy expectations of the "reasonable person" in the myriad of factual situations that lower courts consider every day. The pragmatic risk in applying a *Katz*-based doctrine to a classic trespassory search would be to open the door to the "thorny problems" inherent in *Katz*. *See Jones*, 565 U.S. at 412 (majority opinion). More importantly, the constitutional risk would be to expand the lawful bases for warrantless police entry beyond those permitted at common law. *See Steagald*, 451 U.S. at 211. Additionally, the outcome in this case could signal whether the trespass basis of Fourth Amendment protection retains its post-*Jardines*'s vitality or, instead, becomes re-subsumed, as a factor, into the *Katz* test.

A. *Katz*-Based Doctrines Should Be Reexamined in Light of *United States v. Jones* and *Florida v. Jardines* When Those Doctrines Undermine the Trespass Test's Interpretation of Fourth Amendment Protection.

Importing *Katz*-based doctrines and warrant exceptions into trespass-based search-and-seizure cases risks "erod[ing] that longstanding protection" embodied in the traditional interpretation of the Fourth Amendment. *Cf. Jones*, 565 U.S. at 414 (Sotomayor, J., concurring). Courts are only now beginning to consider the potential impact of *United States v. Jones* and *Florida v. Jardines* on existing *Katz*-based, Fourth Amendment caselaw. A case that considers this potential conflict is *United States v. Ackerman*, 831 F.3d 1292 (10th Cir. 2016). There, Judge – now Justice – Gorsuch, writing for a panel of the U.S. Tenth Circuit Court of Appeals, considered the impact of *Jones* on a *Katz*-based, warrant exception, known as the private search doctrine. *See id.* at 1307-08 (citing *United States v. Jacobsen*, 466 U.S. 109 (1984)).

The private search doctrine, in essence, stands for the proposition that a warrant is not required when the government searches an item whose contraband or criminal nature was uncovered through a private actor's search and then revealed to the government, and the government, in its later warrantless search, does not exceed the scope of the private actor's search. *See Jacobsen*, 466 U.S. at 117 ("Once frustration of the original expectation of privacy occurs, the Fourth

Amendment does not prohibit governmental use of the now-nonprivate information . . . ."). *Jacobsen* considered whether the warrantless search of a Drug Enforcement Administration (DEA) agent violated the Fourth Amendment when that agent was called in by Federal Express after its employees opened a damaged mailing parcel and discovered that it contained plastic bags filled with a white powder. *Id.* at 111-12. Specifically, *Jacobsen* considered whether the agent exceeded the scope of Federal Express's private search either because (1) the agent re-exposed the plastic bags from their mailing container (where Federal Express's employees had returned them prior to the agent's arrival), or (2) the agent's removal and destruction of a small amount of powder from the plastic bags in order to field test the suspected contraband. *See id.* ("A field test made on the spot identified the substance as cocaine.").

On the first question, *Jacobsen* held that, in re-unwrapping the mailing parcel's contents, the agent did not exceed the scope of Federal Express's private search of the package's contents. *Id.* at 120. On the warrantless field testing, *Jacobsen* also held that the private search doctrine was not violated (even though Federal Express had not tested the white powder) because the field test revealed no information aside from the fact that the powder was cocaine – information for which a person lacks a legitimate expectation of privacy. *See id.* at 123. Important here, *Jacobsen* acknowledged that the field test destroyed the powder used in the test, but concluded that the field testing was nevertheless reasonable because it had "only a de minimis

impact on any protected property interest." *See id.* at 125 ("[B]ecause only a trace amount of material was involved, the loss of which appears to have gone unnoticed by respondents, and since the property had already been lawfully detained . . . [,]" the warrantless field testing was reasonable when weighed against the government's interest in detecting drug crimes).

And this is where *Jacobsen* – in particular, *Jacobsen*'s destruction-of-private-property justification – intersects with *Ackerman*. In *Ackerman*, the defendant sent an email, which included four attachments, one of which triggered his internet service provider's hash-value filter for child pornography. 831 F.3d at 1293. Without opening the email or its attachments, the internet service provider (here, AOL) forwarded the suspicious email and attachments to the National Center for Missing and Exploited Children (NCMEC). *Id.* A NCMEC analyst opened the email and all four attachments, and confirmed that all four attachments contained child pornography. *Id.* After his indictment on child pornography charges, the defendant filed a motion to suppress the child pornography, which was denied, and he appealed. *Id.* at 1294.

The government in *Ackerman* argued that *Jacobsen* controlled because, like the field testing of the white powder in *Jacobsen*, NCMEC's inspection of the defendant's email and attachments could reveal no noncontraband information. *See id.* at 1306. The Tenth Circuit rejected this argument, however, finding *Jacobsen* inapplicable because NCMEC had clearly exceeded the scope of AOL's private search – i.e., NCMEC both

opened the defendant's email and its attachments and examined them, while AOL had done neither. *Id.* at 1305-06.

Important here, the Tenth Circuit also expressed reservations about relying on *Jacobsen* in any event, because that case's very foundation had been potentially undermined by *United States v. Jones*. *See id.* at 1307. As the court in *Ackerman* explained:

> Reexamining the facts of *Jacobsen* in light of *Jones*, it seems at least possible the Court today would find that a 'search' *did* take place there. After all, the DEA agent who performed the drug test in *Jacobsen* took and destroyed a 'trace amount' of private property, a seeming trespass to chattels. . . . Given the uncertain status of *Jacobsen* after *Jones*, we cannot see how we might ignore *Jones*'s potential impact on our case.

Id. (quoting *Jacobsen*, 466 U.S. at 125) (citation omitted).

The question, then, is whether a *Katz*-based, warrant exception, such as the automobile exception, *see infra* Sections II, II.A., can be used to *expand* the constitutional bases for warrantless police entry onto a home's curtilage – i.e., beyond those involving consent (express or implied), exigent circumstances, or a warrant.[9] *Amici* argue that it must not. As in *Ackerman*,

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[9] *See Steagald*, 451 U.S. at 211 ("The search at issue here took place in the absence of consent or exigent circumstances. Except in such special situations, we have consistently held that the entry into a home to conduct a search or make an arrest is

Jones and *Jardines* have "potential[ly] impact[ed]"[10] the Virginia Supreme Court's conclusions regarding the scope of the automobile exception. *Cf. Collins*, 790 S.E.2d at 616-18. *Amici* urge the Court to find that, based upon the automobile exception's per se basis – i.e., this exception's "bright-line" authorization[11] of warrantless, probable cause-based police power – the warrantless search of a vehicle located, parked and unattended, within a home's curtilage violates the trespass model of Fourth Amendment protection.

II. Neither *United States v. Jones* Nor *Florida v. Jardines* Signal That the Automobile Exception – a Per Se, *Katz*-Based Warrant Exception – Can Trump the Fourth Amendment's Traditional Baseline of Protection Under the Trespass Test.

Based upon the automobile exception to the Fourth Amendment's warrant requirement, police may stop and search a vehicle without obtaining a warrant if they have probable cause to believe the vehicle contains contraband. *See United States v. Ross*, 456 U.S. 798, 807-09 (1982). The exception was originally justified by a vehicle's ready mobility. *See Carroll v. United States*, 267 U.S. 132, 153 (1925) (observing that "practically since the beginning of the government," the Court has recognized a difference between a search of

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unreasonable under the Fourth Amendment unless done pursuant to a warrant.").

[10] *See Ackerman*, 831 F.3d at 1307.

[11] *See Collins*, 790 S.E.2d at 618.

a "dwelling house or other structure" where "a proper official warrant readily may be obtained" and the search of an automobile "where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction . . . ."). Prior to *Katz*, however, the practicability (or the lack thereof) of obtaining a warrant remained an important consideration. *See Carroll*, 267 U.S. at 156. In fact, *Carroll* expressly instructed courts to determine whether the facts – i.e., the impracticability of obtaining a warrant – supported the warrantless, vehicle search. *See id.*. As *Carroll* explained:

> In cases where the securing of a warrant is *reasonably practicable, it must be used* and when properly supported by affidavit and issued after judicial approval protects the seizing officer against a suit for damages. In cases where seizure is *impossible except without warrant*, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause.

Id. (emphasis added).

After *Katz*, however, the automobile exception came to be supported by additional justifications – justifications arising from society's reduced expectations of privacy in vehicles and vehicle travel. *See California v. Carney*, 471 U.S. 386, 391 (1985) ("[A]lthough ready mobility alone was perhaps the original justification for the vehicle exception, our later cases have made clear that ready mobility is not the only basis for the exception."). As *Carney* explained, society's reduced

expectations of privacy in vehicles were additionally based on "plain view" considerations – i.e., the ease of seeing into the passenger compartment of most vehicles, and because "pervasive schemes of [vehicle] regulation" made periodic vehicle stops "'an everyday occurrence . . . .'" *See id.* at 391-92 (quoting *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976)). In two per curiam opinions, the Court made clear and reiterated that the automobile exception "has no separate exigency requirement." *See Maryland v. Dyson*, 527 U.S. 465, 466-67 (1999) ("And under our established precedent, the 'automobile exception' has no separate exigency requirement. We made this clear in *United States v. Ross*, 456 U.S. 798, 809 (1982)."); *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (per curiam) ("More recent cases provide a further justification: the individual's reduced expectation of privacy in an automobile. . . . If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more.") (citation omitted).

A. The Automobile Exception Evolves, After *Katz*, into a Per Se Warrant Exception.

The Court's post-*Carroll* (but pre-*Katz*), vehicle-search decisions reveal that genuine, case-specific exigency existed in those cases where a warrantless vehicle search was justified under the automobile exception. Those cases focused on, for the most part, whether probable cause existed to support the

warrantless vehicle search at issue, not the reasonableness of law enforcement's decision to dispense with seeking a search warrant.

In each case where the warrantless vehicle search was upheld, the exigency at the scene of the vehicle stop was apparent. *Compare, e.g.*, *Brinegar v. United States*, 338 U.S. 160, 163, 175-76 (1949) (upholding, based on probable cause to believe the defendant was transporting illegal liquor in his vehicle, a warrantless vehicle search which occurred at the roadside after a one-mile police chase in which the agents had to physically force the defendant's vehicle off the road); *Scher v. United States*, 305 U.S. 251, 254-55 (1938) (upholding, based on probable cause to believe the defendant was transporting illegal liquor in his vehicle, a warrantless vehicle search which occurred after law enforcement tailed the defendant's vehicle until he pulled into his garage because "[p]assage of the car into the open garage closely followed by the observing officer did not destroy this right [i.e., of a warrantless search]."); *Husty v. United States*, 282 U.S. 694, 701 (1931) (upholding, based on probable cause to believe the defendant was transporting intoxicating liquor in his vehicle, a warrantless vehicle search which occurred at the roadside after two of the vehicle's occupants fled from the vehicle-stop scene), *with Preston v. United States*, 376 U.S. 364, 367-68 (1964) (rejecting the validity of a warrantless stationhouse search of the arrestee's vehicle as either a search incident to arrest or a probable cause-based search, because "there was no danger that any of the men arrested could have

used any weapons in the car or could have destroyed any evidence of a crime . . . ."). Even in *Cooper v. California*, a case decided just months before *Katz*, law enforcement's warrantless stationhouse search of the arrestee's impounded vehicle (which took place a week after his arrest) was justified on more than simply probable cause. 386 U.S. 58, 58, 61-62 (1967) ("It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time [i.e., the four-month period involved in the vehicle-forfeiture proceeding], had no right, even for their own protection, to search it.").

It was only *after Katz* – after the reduced privacy expectation associated with vehicles was factored into the warrant-exception analysis – that the automobile exception hardened into the per se warrant exception for which is it now known. *See Ross*, 456 U.S. at 809 (finding that, based on *Carroll*, a probable cause-based, vehicle search satisfied the automobile exception, "even though a warrant has not been actually obtained."). In fact, even in the early years after *Katz* was decided, the Court continued to recognize that *Carroll* had treated the existence of case-specific exigency as a consideration in justifying a warrantless vehicle search. *See Coolidge v. New Hampshire*, 403 U.S. 443, 462-63 (1971) (plurality opinion) (finding that the automobile exception, under *Carroll*, was inapplicable to a warrantless search of the defendant's vehicle located, parked and unattended, in his driveway – explaining that "by no possible stretch of the legal imagination can this be made into a case where it is not practicable to secure a warrant, and the automobile exception,

despite its label, is simply irrelevant.") (internal quotation marks and citation omitted); *Chambers v. Maroney*, 399 U.S. 42, 50 (1970) ("Neither *Carroll*, *supra*, nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords."). And in *Chambers*, the generalization of *Carroll*'s exigency justification can be seen to emerge. *See Chambers*, 399 U.S. at 50-51 (observing that a probable cause-based search of a "readily movable" vehicle was "most often unforeseeable").

Later, in *Ross*, the automobile exception completed its journey. To support its conclusion that the automobile exception was a per se warrant exception, *Ross* reviewed *Carroll*'s facts, reasoning, and justifications. *See Ross*, 456 U.S. at 804-09. Important here, *Ross* recast *Carroll*'s discussion of its proposed warrant exception – i.e., in which *Carroll* explained that law enforcement must obtain warrants for vehicle searches when "reasonably practicable," *see Carroll*, 267 U.S. at 156 – into, instead, a statement of the more general, Fourth Amendment proposition that a warrant exception is an "exception to the general rule that in cases where the securing of a warrant is reasonably practicable, it must be used . . . ." *See Ross*, 456 U.S. at 807 (internal quotation marks omitted). Notwithstanding this assertion about *Carroll*'s rationale, other language in *Ross* arguably acknowledged that the warrant exception in *Carroll* had been justified on case-specific exigency. *See id.* at 806-07 (recounting *Carroll*'s facts and explaining that "[g]iven the nature of an automobile *in*

transit," *Carroll* recognized that a warrant exception for the probable cause-based search of a vehicle was not, "[*i*]*n this class of cases*," unreasonable) (emphasis added).

Ross's reinterpretation of *Carroll* did not go unnoticed, however. Justice Marshall, in his *Ross* dissent, argued that *Carroll* had not established the per se warrant exception that the *Ross* majority had claimed. *See Ross*, 456 U.S. at 836 (Marshall, J., dissenting) ("The Court [in *Carroll*] did not, however, suggest that obtaining a warrant for the search of an automobile is always impracticable."). Justice Brennan joined in Justice Marshall's dissent in *Ross*, *see id.* at 827, and Justice White noted in his separate *Ross* dissent that he "agree[d] with much of Justice Marshall's dissent in this case." *Id.* at 826 (White, J., dissenting).

Two important conclusions flow from the automobile-exception jurisprudence. First, the automobile exception, as originally framed, was not the per se warrant exception that the modern Court now contemplates. Second, the modern interpretation of the automobile exception – which is based, in large part, on *Katz*'s reduced-privacy-expectations analysis – does not support a per se warrant exception in cases where a vehicle is located, parked and unattended, within a home's curtilage.

III. The Automobile Exception Does Not Automatically Apply to the Search of an Unattended Vehicle Parked Within a Home's Curtilage.

Warrantless police entry into the home is the "chief evil" against which the Fourth Amendment was intended to prevent. *United States District Court*, 407 U.S. at 313; *see United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976) (observing that "the sanctity of private dwellings [is] ordinarily afforded the most stringent Fourth Amendment protection."). The Fourth Amendment's protections also extend to a home's curtilage. *Oliver*, 466 U.S. at 180 (describing the common law's distinction between "open fields" and "curtilage," and observing that "only the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home."). *Oliver* explained that curtilage was "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" *Id.* (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

In *California v. Ciraolo*, the Court described the protection afforded to the curtilage as "essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." 476 U.S. 207, 213 (1986). And, more recently, the Court reaffirmed that a home's curtilage "enjoys protection as part of the home itself." *Jardines*, 569 U.S. at 6 ("This right [i.e., to retreat into one's home and be free from unreasonable governmental

intrusions] would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity. . . .").

The Virginia Supreme Court, in this case, concluded there was no need to determine whether the officer had entered onto the home's curtilage because it held that the automobile exception supported the officer's warrantless entry to perform the physical investigation of Petitioner's tarp-covered motorcycle. *See Collins*, 790 S.E.2d at 619 ("Collins argued that the automobile exception does not apply to a vehicle parked in a private driveway. The trial court did not consider this question, but the Court of Appeals addressed the issue and appeared to agree with Collins."). Important here, the Virginia Supreme Court in *Collins* also concluded that warrantless police entry to search a vehicle located on private property that was "open to the public" – such as a home's driveway – did not violate the Fourth Amendment. *See id.* at 619 (quoting *Thims v. Commonwealth*, 235 S.E.2d 443, 447 (Va. 1977)).

A. An Area That Is "Open to the Public" Can Receive Fourth Amendment Protection as Part of a Home's Curtilage.

The Court determines whether Fourth Amendment protection is afforded to private property depending on whether the property is an "open field" – in which case it receives no protection from warrantless police entry – or is, instead, a home or its associated

curtilage (which receives Fourth Amendment protection). *See Jardines*, 569 U.S. at 6 ("[W]hen it comes to the Fourth Amendment, the home is first among equals."). With that said, there is no "private driveway" exception that withholds Fourth Amendment protection simply because a home's driveway is often open to public view or is physically accessible to the public. In fact, after *Jardines* we now know that an area can be both "open to the public" *and* curtilage. *See id.* at 7 ("The front porch is the classic exemplar of an area adjacent to the home and to which the activity of home life extends.") (internal quotation marks omitted). Therefore, the Virginia Supreme Court erred in withholding Fourth Amendment protection from an area that was closely adjacent to, and intimately connected with, Petitioner's girlfriend's suburban home on the basis that the area could be seen, or was physically accessible from, the street.[12] *See Jardines*, 569 U.S. at 7 ("[T]he conception defining the curtilage is at any rate

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[12] Justice Mims, in his *Collins* dissent, described the location of Petitioner's parked, tarp-covered motorcycle as being "merely feet . . . from the side perimeter wall of the house." *Collins II*, 790 S.E.2d at 623 n.4 (Mims, J., dissenting). Specifically, the motorcycle was parked on a portion of the driveway that *extended beyond* the direct route to the front door. *See id.* (emphasis added) ("[T]he driveway extends past the house, running alongside it after the front yard ends, and continues well beyond the front porch and front door to allow vehicles to be parked beside the house."). The Virginia Court of Appeals "assume[d] without deciding" that Petitioner's motorcycle was parked within the home's curtilage at the time of the officer's entry and physical investigation. *See Collins v. Commonwealth*, 773 S.E.2d 618, 623 (Va. Ct. App. 2015).

familiar enough that it is easily understood from our daily experience.") (internal quotation marks omitted).

But that does not end the matter. To interact with a home's occupants, a police officer may, without a warrant, enter a home's curtilage via a direct pathway to the front door – i.e., the front walkway or, if none, the driveway – to engage the home's occupants. *See id.* at 19, 21 (Alito, J., dissenting) (observing that an implied license "has certain spatial and temporal limits. A visitor must stick to the path that is typically used to approach a front door, such as a paved walkway. A visitor cannot . . . take other circuitous detours that veer from the pathway that a visitor would customarily use."); *see also id.* at 8 (majority opinion) ("This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then . . . leave.").

Therefore, *Jardines* limits an officer's authority in critical ways. First, *Jardines* limits the officer's authority to stray from the home's front-door pathway onto other curtilage areas. *See id.* at 9 (majority opinion) ("The scope of a license – express or implied – is limited not only to a particular area but also to a specific purpose."). Second, even if the officer sticks to the home's front-door pathway – i.e., the curtilage area an officer passes along or occupies in order to conduct a "knock and talk" encounter with the home's occupants[13] – the

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[13] *See id.* at 21 (Alito, J., dissenting) (discussing law enforcement's authority to perform a warrantless "knock and talk" encounter with a home's occupants, and explaining that a visitor's

officer is not permitted to investigate or gather information. *See id.* at 7 (majority opinion) ("[A]n officer's leave to gather information is sharply circumscribed when he steps off those [public] thoroughfares and enters the Fourth Amendment's protected areas."); *see also id.* at 9 n.3 (arguing that even if police "stay on the base path, to use a baseball analogy"– i.e., approach the home's front door by the direct, front-door pathway – police are not permitted to "gather[ ] evidence" without a warrant).

So, *Jardines* imposes a categorical prohibition on warrantless police investigation within a home's curtilage (aside from speaking with the home's occupant) and, additionally, restrains officers from detouring from the home's front-door pathway. Put another way, the Fourth Amendment protects the curtilage of a home from warrantless police investigation, even if that area is *physically* accessible to law enforcement in performing a lawful "knock and talk" – i.e., the area encompassing a home's front-door pathway as well as the front door itself – or that the area is *visually* accessible to the officer, either from the officer's lawful vantage point on the street or as that vantage point shifts due to the officer's lawful travel to the front door. *See id.* (emphasizing that the visual observation of the home's curtilage in *Ciraolo* "was done in a physically nonintrusive manner") (internal quotation marks omitted).

"implied license to approach the front door [also] extends to the police").

B. The Trespass Basis of Fourth Amendment Protection Was Violated by the Officer's Detour from the Direct Path to the Front Door and Physical Search of Petitioner's Tarp-Covered Motorcycle.

By disturbing the tarp to view the motorcycle's Vehicle Identification Number (VIN), the officer in this case engaged in an "investigation" within the meaning of *Jardines*. *See Jardines*, 569 U.S. at 9 ("To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhounds into the garden . . . would inspire most of us to – well, call the police."). Regardless of whether the motorcycle was parked *on* the direct, front-door pathway (it was not) or *within* the home's curtilage but beyond the home's direct, front-door pathway (it was), *Jardines* prohibits the officer's warrantless physical investigation of Petitioner's tarp-covered motorcycle. To put it differently, regardless of whether the tarp-covered motorcycle was *physically* accessible to the officer as he stood on the home's direct, front-door pathway or was, instead, simply *visually* accessible to the officer from either his vantage point on the street or while traversing the home's direct, front-door pathway, *Jardines* prohibits the officer's warrantless physical investigation of the motorcycle in either event. *Cf. id.* at 9 n.4 (distinguishing the lawfully conducted "knock and talk" at issue in *Kentucky v. King*, 563 U.S. 452 (2011), and observing "[b]ut no one is impliedly

invited to enter the protected premises of the home in order to do nothing but conduct a search.").

1. The Officer's Warrantless Investigation of Petitioner's Motorcycle Is Not Saved by *New York v. Class*, *United States v. Jacobsen*, or the Plain View Doctrine.

The officer's physical investigation of Petitioner's motorcycle is not saved by the Court's holding in *New York v. Class*, 475 U.S. 106 (1986). In *Class*, the Court considered whether the Fourth Amendment was violated when a traffic officer reached his hand into the passenger compartment of a lawfully stopped vehicle to shift papers on the vehicle's dashboard that obstructed the officer's view of the vehicle's VIN. *See id.* at 107-08. Although *Class* held that the officer's physical entry into the vehicle was a "search," *see id.* at 115, the Court found the search to be reasonable for two reasons. First, *Class* explained that drivers lack a reasonable expectation of privacy in their vehicles' VIN. *Id.* at 119. Second, and important here, Class's vehicle had been *lawfully seized* at the traffic stop. *Id.* (justifying the search, in part, on "the fact that the officers observed [Class] commit two traffic violations."). In contrast to *Class*, the investigating officer in this case violated *Jardines* in conducting his warrantless entry to investigate the motorcycle's VIN. Therefore, even though *Class* also involved an investigation of a vehicle's VIN, *Class* does not excuse the officer's unlawful

entry onto the home's curtilage to investigate and view Petitioner's motorcycle's VIN.

Nor is the officer's warrantless entry and investigation saved by *United States v. Jacobsen*, 466 U.S. 109 (1984). See *supra* Section I.A. *Jacobsen* justified upholding the agent's warrantless field test, in part, on the fact that the field test disclosed no noncontraband information – i.e., only whether the white powder was cocaine, but nothing else. *Jacobsen*, 466 U.S. at 122. As to the field test's disclosure of the contraband nature of the white powder, *Jacobsen* explained that a person lacks a legitimate expectation of privacy in contraband. *Id.*

Here again, however, the lawfulness of the police conduct *prior to* the field testing was key to *Jacobsen*'s decision to uphold the warrantless field test. To explain, *Jacobsen* viewed the agent's conduct as involving "two steps." *See id.* at 118. The first step concerned the agent's warrantless re-unwrapping of the mailing container's contents, which *Jacobsen* upheld under the private search doctrine. *Id.* at 120. Based upon the lawfulness of that threshold search, *Jacobsen* proceeded, in the second step, to determine the reasonableness of the warrantless field testing. *See id.* at 122-23, 125; see *supra* Section I.A.

This case is quite different from the searches in *Jacobsen*. Here, the officer's warrantless physical investigation of Petitioner's tarp-covered motorcycle was made possible only by a Fourth Amendment violation – i.e., violation of the trespass basis of Fourth

Amendment protection under *Jardines*. Further, unlike the field testing in *Jacobsen*, the physical search of Petitioner's tarp-covered motorcycle was capable of revealing noncontraband information. *Compare id.* at 122 ("[The field test] could tell [the agent] nothing more, not even whether the substance was sugar or talcum powder."), *with Ackerman*, 831 F.3d at 1306-07 (posing the question, in dicta, of whether NCMEC's search of the defendant's email and attachments risked exposing noncontraband information because, among other reasons, AOL's hash-value match could have been mistaken); see *supra* Section I.A. In this case, there was no way for the officer to know in advance whether additional private and protected facts – i.e., a child's bicycle helmet – was *also* concealed under the tarp.

Further, the officer's warrantless entry and search of Petitioner's motorcycle is not saved by the plain view doctrine. The plain view doctrine authorizes a police officer, under certain circumstances, to seize contraband or an evidentiary item without a warrant when that contraband or item is plainly visible to the police officer. *See Coolidge*, 403 U.S. at 465. Those circumstances include, first, that the officer must observe the contraband or item from a lawful vantage point. *See Horton v. California*, 496 U.S. 128, 137 (1990) ("It is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly seen."). Second, the item's "incriminating character must . . . be immediately apparent," *see id.* (internal quotation marks omitted), without the officer's manipulation of

the item. *See Arizona v. Hicks*, 480 U.S. 321, 325 (1987) ("[T]he distinction between looking at a suspicious object in plain view and moving it even a few inches is much more than trivial for purposes of the Fourth Amendment.") (internal quotation marks omitted). Important here, the item's incriminating character is not considered to be "immediately apparent" if "some further search of the object" was conducted to confirm the item's nature. *See Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993) (holding that the Fourth Amendment was violated by the officer's physical manipulation of a "small lump," that the officer detected in the defendant's jacket pocket during a lawful *Terry* stop, to confirm the officer's suspicion that the lump was a rock of crack cocaine). And third, the officer must have "a lawful right of access to the object itself." *See Horton*, 496 U.S. at 137 ("[N]ot only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself.").

The investigating officer's actions in this case do not fall within the plain view doctrine. The motorcycle's VIN could not be seen until the officer disturbed the tarp – i.e., performed a "further search" of the tarp-covered motorcycle. *See Dickerson*, 508 U.S. at 375; *Hicks,* 480 U.S. at 328 (observing that the officer, in moving the stereo equipment to view the items' serial numbers, had done more than "merely look[ ] at what is already exposed to view, without disturbing it . . . ."). Moreover, the officer lacked a lawful right of access to the motorcycle itself. The officer in this case violated *Jardines* because he both conducted an investigation

within the home's curtilage and detoured from the home's front-door pathway onto the home's protected curtilage area to perform the further search of Petitioner's motorcycle. See *supra* Section III.A.; *see Hicks*, 480 U.S. at 329 (explaining that the officer's lack of authority, without a warrant, to move the stereo equipment to check the items' serial numbers was the same limitation he would have had "if, while walking along the street he had noticed the same suspicious stereo equipment sitting inside a house a few feet away from him, beneath an open window."). Therefore, the plain view doctrine is inapplicable in this case.

CONCLUSION

For these reasons, the decision of the Virginia Supreme Court should be reversed.

Respectfully submitted,

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No. 16-1027

In The Supreme Court of the United States

RYAN COLLINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Virginia

BRIEF OF INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The Institute for Justice ("IJ") is a nonprofit, public-interest law center committed to defending the essential foundations of a free society and securing the constitutional protections necessary to ensure individual liberty. A central pillar of IJ's mission is to protect private property rights, both because an individual's control over his own property is a tenet of personal liberty and because property rights are inextricably linked to all other civil rights. *See United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 61 (1993) ("Individual freedom finds tangible expression in property rights.").

The Institute's work in this regard includes challenging programs that permit government officials to trespass against private property without first securing a warrant based on individualized probable cause. *See, e.g., McCaughtry v. City of Red Wing*, 831 N.W.2d 518 (Minn. 2013); *Black v. Vill. of Park Forest*, 20 F. Supp. 2d 1218 (N.D. Ill. 1998). It has also challenged government requirements that food truck owners install and operate GPS tracking devices on their vehicles as a condition of licensure. *See LMP Services, Inc. v. City of Chicago*, No. 16-3390 (Ill. App. Ct. filed Apr. 4, 2017). In addition, IJ has filed *amicus* briefs in numerous Fourth Amendment cases before this Court, including in *City of Los Angeles v. Patel*, 576 U.S. ___, 135

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[1] All parties have consented to the filing of this brief. *Amicus* affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

S. Ct. 2443 (2015), and *Florida v. Harris*, 568 U.S. 237 (2013).

SUMMARY OF ARGUMENT

In recent years this Court has reaffirmed that property rights are central to the interpretation of the Fourth Amendment. This case provides an opportunity to apply that important principle. That is because the government in this case committed two trespasses, one against the *real* property where Petitioner resided, the second against an *effect* – the covered motorcycle – on that property. The government committed both trespasses without a warrant. Petitioner rightly argues that these trespasses occurred on the curtilage of his home.

But regardless of the curtilage issue, the "open fields" doctrine cannot save the Commonwealth's actions in this case. As *Amicus* discusses in greater detail below, the doctrine turns on a dubious and ahistorical reading of English common law. Moreover, this Court's narrow reading of the Fourth Amendment term "house," in justifying the doctrine, stands in stark contrast with its other decisions, which have extended Fourth Amendment protection to commercial buildings despite their being outside the original understanding of that term. And, even putting those flaws aside, this Court has never used the open fields doctrine to justify anything but an observational search, separate from the search of any person, house, paper,

or effect. Given the long history of common law protection of effects against trespass, the Fourth Amendment protects against warrantless searches of effects on private property just as it protects against warrantless searches of the other items enumerated in the Fourth Amendment. Furthermore, the vehicle exception to the warrant requirement does not apply. The warrantless search in this case violated the Fourth Amendment and the judgment of the Virginia Supreme Court should be reversed.

ARGUMENT

The Court should not apply the "open field doctrine" or the "automobile exception" to this case. If the Court does so, it could subject all vehicles, and even other effects, on private property to warrantless searches. Petitioner has already addressed why the automobile exception should not apply, Br. of Pet'r at 10-39, and other *amici* will as well. This brief instead primarily addresses why the open fields doctrine does not justify the warrantless search at issue. It explains how the doctrine rests on weak foundations and has never been used by this Court to justify the search of an *effect*, as opposed to a search of an open field. It should not do so in this case either.

The importance of this case can be seen in the following example. A farmer parks his egg-delivery truck beside his chicken coop, on his own private property, and far away from the property line, but some distance

from his house. He then retires to his house for the evening. The police want to search the inside of the truck at night, without the farmer's knowledge, including in areas not in plain view through the windows. Under what *Amicus* expects the Commonwealth to argue, that search would not require a warrant because it concerns an automobile located in an "open field."

Longstanding principles of trespass law, however, tell us that the police's plan would constitute trespasses, both to the land where the truck rests and to the truck itself. *Amicus* explains below why those trespasses mean such a warrantless search would violate the Fourth Amendment, the open fields doctrine notwithstanding. The doctrine does not justify the warrantless search of an effect on private property not open to the public. This Court should rule for Petitioner, and make clear that searches of vehicles and other effects on private property require a warrant.

Below, *Amicus* first briefly discusses the Court's recent turn toward a property-rights understanding of the Fourth Amendment, and why that understanding directly applies to this case. *Amicus* then turns to the open fields doctrine. The doctrine rests on flawed premises and does not comport with this Court's recent protections against common law trespass by the government. It also has never been used by this Court to justify a search of an *effect* in an open field, and should not be used to justify the search in this case. Finally, *Amicus* briefly discusses why the automobile exception also does not justify the search in this case.

I. This Court's Recent Rulings in *Jones* and *Jardines* Demonstrate Why a Property-Rights Interpretation of the Fourth Amendment Should Control in This Case.

The Fourth Amendment has entered a property-rights renaissance. As this Court is well aware, its original touchstone for whether a search occurred turned on the government's actions – specifically whether the government had physically trespassed upon private property for the purpose of acquiring information. But technological developments soon showed the limitations of that approach, *see Olmstead v. United States*, 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting), and eventually led this Court to articulate a second, independent ground for determining whether a search had occurred – the "reasonable expectation of privacy" test laid out in *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). Although that alternate formulation solved some problems, it created others, particularly when the government sought information that, while not reasonably being thought of as private, could only be acquired by gaining physical access to the object of surveillance.

This Court recognized that lower courts had erringly viewed *Katz* as being the exclusive way to determine if a Fourth Amendment search had occurred. And so, beginning earlier this decade, this Court began to disabuse lower courts of that notion. Its first step in that project occurred in *United States v. Jones*, 565 U.S. 400 (2012), where this Court held that the government's manipulation of an effect (in *Jones*, placing a

GPS device on a motor vehicle) in order to gain information gave rise to Fourth Amendment scrutiny. One year later, this Court extended the reasoning of *Jones* to real property, holding in *Florida v. Jardines*, 569 U.S. 1 (2013), that the government's taking of its drug-sniffing dog onto a person's front porch also constituted a Fourth Amendment search because its actions were outside the implied license that people enjoy when entering upon someone's homestead.

The facts presented by this case implicate the holdings of both *Jones* and *Jardines*. Here, an officer of the law who was looking for a motorcycle entered onto the property where Mr. Collins lived. Rather than simply walk to the front porch, knock on the door, and talk to Mr. Collins – an investigative matter that raises no constitutional scrutiny unless the implied license has been revoked, *see United States v. Carloss*, 818 F.3d 988, 1003 (10th Cir. 2016) (Gorsuch, J., dissenting) (concluding that numerous "No Trespassing" signs should have served to revoke the implied license) – the officer walked past the path to the back of the driveway to instead inspect a motorcycle parked immediately next to the home. And when a cover, snugly wrapped around that motorcycle, obscured the officer's view, he engaged in a second, independent search by removing that cover without permission so he could inspect the bike's serial number.

Both of these searches trigger Fourth Amendment scrutiny, yet the government now attempts to escape this Court's holding in *Katz* that "searches conducted outside the judicial process, without prior approval by

judge or magistrate, are per se unreasonable under the Fourth Amendment." 389 U.S. at 357. It primarily does so by claiming that the automobile exception first laid out in *Carroll v. United States*, 267 U.S. 132 (1925), alleviates any need for a warrant. And, although the question presented concerns the automobile exception, the Commonwealth may also contend to this Court that the officer's actions are of no constitutional moment because although they occurred in the driveway immediately next to Mr. Collins' home, this area should be viewed as an "open field," a portion of private property which this Court's Fourth Amendment jurisprudence leaves unprotected. At the petition stage, the Commonwealth notably refused to concede that the motorcycle was located on the curtilage when it was searched. Br. in Opp'n to Pet. for Writ of Certiorari, No. 16-1027, 33-36.

This Court should reject the application of the open fields doctrine to this case. As *Amicus* explains in more detail below, the doctrine, which serves to reduce the scope of Americans' constitutional rights, rests on dubious constitutional footing. Moreover, because the open fields doctrine only allows officials to enter certain areas of private property from which to observe, it cannot serve to excuse the officer's second search, the removal of the cover and inspection of the motorcycle. Because the Virginia Supreme Court's ruling is emblematic of an unwarranted and liberty-reducing departure from this Court's property rights and Fourth Amendment jurisprudence, this Court should reverse.

II. This Court Should Not Allow the "Open Fields" Doctrine to Influence the Protection an "Effect" Receives Under the Fourth Amendment.

Petitioner rightly argues that the search occurred in the curtilage of his home. Br. of Pet'r at 31-36. But even if the motorcycle was in an "open field," as *Amicus* expects the Commonwealth to argue, the searching of Mr. Collins' effect still required a warrant. The open field doctrine adds nothing to the constitutionality of the search, and any application of the doctrine in this case should be rejected.

The doctrine is deeply problematic from a historical and constitutional perspective. Its conclusion that certain pieces of private property lose all constitutional protection is inconsistent with this Court's precedents. And, because the open fields doctrine only allows officials to enter onto private property for observational purposes, its invocation would still require this Court to wrestle with thorny Fourth Amendment issues regarding the arresting officer's manipulation of effects, i.e., the motorcycle and the cover. The Fourth Amendment's, and the common law's, protection of effects has a long history that does not justify jettisoning the warrant requirement when an effect is searched. This Court should therefore reject any argument that this case does not implicate its holding in *Jardines* because of the location of the effect.

A. The Open Fields Doctrine Has No Historical Justification and Rests on an Error Made, and Then Compounded, by This Court.

The open fields doctrine only exists because of an error that this Court made in the prohibition era. In *Hester v. United States*, 265 U.S. 57 (1924), authored by Justice Holmes, the Court reviewed the conviction of a man who was running a whisky still on a farm. The officers trespassed onto a field and, concealed "fifty to one hundred yards away," saw whisky jugs being exchanged outside a house. *Id.* at 58. This evidence then led to the defendant's conviction. In rejecting the defendant's attempt to suppress the evidence, the Court stated that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law." *Id.* at 59. The sole citation to support this historical assertion was to three pages of Blackstone's *Commentaries*. *Id.* (citing 4 Blackstone, *Commentaries* *223, *225-26).

The problem with Justice Holmes' citation is that in those pages, Blackstone was not talking about open fields, officers of the law, or even trespass. Instead, he was discussing the elements of burglary. Blackstone simply lays out the rule that to commit burglary, among other elements, the burglar must break into a home, and do it at night. 4 Blackstone, *Commentaries* *223-26. Blackstone contrasts a nighttime home invasion both with invasions of the home during the day,

and invasions of other structures, including a "barn, warehouse, or the like. . . ." *Id.* at *225. He does not even mention "fields," let alone "open" ones. He also places no special emphasis on curtilage, only that if an outbuilding, such as a barn, is attached to a house, or "within the curtilage," then the entering of the barn, at night, could be burglary. *Id.*

Thus, all Blackstone said in the pages *Hester* cited was that at common law an uninvited stranger who entered a home at night committed burglary, but a thief who enters a home during the day, or a barn or a warehouse, did not. The thief still committed a crime, of course, when committing these other various trespasses, just not the specific crime of burglary.

Yet, *Hester* took this distinction between burglary and other crimes and gave it constitutional significance by applying it to an area – an open field – that Blackstone does not even address. By the same, ill-founded reasoning, *Hester* could have stated that the Fourth Amendment does not apply to the government entering homes *during the day*, or entering buildings such as barns and warehouses *at all*, all areas Blackstone contrasted to a break-in of the home at night. But that is the logical conclusion once the citation to Blackstone is actually examined. In short, the citation to Blackstone did nothing to support the Court's refusal to apply the Fourth Amendment to an "open field."

Therefore, with all due respect to Justice Holmes and the Court in *Hester*, the open fields doctrine, as articulated there, had no historical or jurisprudential

basis. And given the very brief reasoning of the opinion, that means the doctrine had no justification at all.

This Court did not reexamine the open fields doctrine again for 60 years, until *Oliver v. United States*, 466 U.S. 170 (1984). There the Court gave a lengthier justification, although it mostly depended on *Hester* and whether there exists a "legitimate expectation of privacy" in an open field under the *Katz* standard.[2] *Id.* at 177-181. It did not discuss whether the common law protected against trespassers in open fields or other property not within a home or its curtilage.

The *Oliver* Court also made the textual argument that because open fields are not mentioned in the Fourth Amendment, they do not receive the provision's protection, unlike persons, houses, papers, or effects. Yet, the Court did not square this with how the Fourth Amendment had been interpreted to protect other items not enumerated in its text, such as commercial property, and it has not since. This Court has found the Fourth Amendment to protect a warehouse, *See v. City of Seattle*, 387 U.S. 541 (1967), an electrical and plumbing business, *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), and a furniture store, *Michigan v. Tyler*, 436 U.S. 499 (1978), for example. It has even found some degree of protection for "closely regulated industries," such as automobile junkyards. *New York v. Burger*, 482 U.S. 691 (1987) (holding that although a warrant was not required to search, the search still must be

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[2] With *Jones*, of course, we know now that *Katz* is only one way the government can violate the Fourth Amendment.

reasonable). None of these items of property have been held to be "persons, houses, papers, or effects," but this Court has held they all receive at least some protection from the Fourth Amendment. Indeed, the meaning of "house" when the Amendment was adopted does not seem to have included commercial property, any more than it does today. *See, e.g.*, Samuel Johnson, *Dictionary of the English Language* (1785, 6th ed.) (defining "house" to mean "1. a place wherein a man lives; a place of human abode 2. Any place of abode 3. Places in which religious or studious persons live in common") (unpaginated). This practice of nevertheless protecting commercial property stands in contrast to open fields, which this Court has determined receive no protection at all.

B. Because This Court's Jurisprudence Only Authorizes Officials to Observe When in an Open Field, It Cannot Form a Basis for the Arresting Officer's Warrantless Inspection of the Cover and Motorcycle.

The weak history and textual analysis that underlies the open fields doctrine is reason enough not to apply it in this case. But even aside from those weaknesses, the doctrine is still incapable of resolving the dispute at the heart of this case: whether a warrant was required for the search of the motorcycle. That is because the open fields doctrine only extends to entry and observation from those fields, not to searches of any effects that may be found within them.

It is critical to remember that Officer Rhodes did not just enter onto Mr. Collins' property to get a better look at the motorcycle parked alongside the house. As the record demonstrates, the motorcycle was not just sitting in the open, but was instead protected from the elements by a large vehicle cover that wrapped around the entire bike. Br. of Pet'r at 5. The officer removed that cover so that he could learn the motorcycle's vehicle identification number. *Id.*

Even if the motorcycle was not in the curtilage, this action – taken by the officer in order to gather information as part of his criminal investigation – takes the facts of this case outside of the open fields doctrine. Accordingly, the officer's warrantless search of Mr. Collins' personal property can only comport with the Fourth Amendment upon other grounds separate from the open fields doctrine.

i. This Court has never applied the open fields doctrine to the inspection of effects on private property.

Since *Oliver* the Court has not had much occasion to apply the open fields doctrine, but it has implied that an effect *in* an open field is entitled to Fourth Amendment protection, unlike the "field" itself, and that the doctrine only applies to observations, and nothing more. In *United States v. Dunn*, 480 U.S. 294 (1987), the Court held that officers were allowed to look into the window of a barn that was located in an open field, and found it significant that the officers did

not enter the barn or disturb its contents without a warrant. *Id.* at 304. It also briefly explained in *Jones* and *Jardines* that open fields are not protected because they are not enumerated in the text of the Fourth Amendment – but contrasted that to effects. *Jones*, 565 U.S. at 411 ("The Government's physical intrusion on [an open field] – unlike its intrusion on the 'effect' at issue here – is of no Fourth Amendment significance."); *Jardines*, 569 U.S. at 6. And in *Jones*, of course, it squarely held that a trespass on an effect – in that case a car in a public parking lot – is a search under the Fourth Amendment. *Jones*, 565 U.S. at 410. Therefore, an effect *in* an open field is still an "effect," and is still textually protected by the Fourth Amendment. The doctrine has nothing to say about effects, wherever they may be.

ii. A warrant is required for a search of an effect on private property, just as one is required for searches of people, houses, and papers.

The Fourth Amendment specifically protects "persons, houses, papers, and effects." As explained above, in *Jones*, this Court made clear that "effects" receive the protection of the Fourth Amendment, just as persons, houses, and papers do. *Jones*, 565 U.S. at 404-05 (occupying an effect in order to obtain information constitutes a "search"). Further, the constitutional baseline for all searches – whether of persons, houses, papers, or effects – is that "searches conducted outside the judicial process, without prior approval by judge or

magistrate, are per se unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions." *Katz*, 389 U.S. at 357. *See also Jones v. United States*, 357 U.S. 493, 499 (1958) ("The exceptions to the rule that a search must rest upon a search warrant have been jealously and carefully drawn. . . ."). This Court has never created a general exception to the warrant requirement for an effect just because it is an effect.

This makes eminent sense because, at common law, effects were fully protected from trespass. Trespass to chattels, replevin, and detinue are examples of actions used to recover chattels, or receive compensation for damage to chattels, if a person came onto private property and took or even touched an effect. *See, e.g.*, *Melville v. Brown*, 15 Mass. (Tyng) 82 (1818) (sheriff's seizure and sale of chattels could be a trespass because sheriff was under an obligation to return chattels to non-debtor plaintiff after satisfying judgement against the chattels' other owner); 3 Blackstone, *Commentaries* *145-46 (discussing replevin and detinue as actions to restore items of personal property to their rightful possessor); Sydney Hastings, *A Treatise on Torts and the Legal Remedies for Their Redress* 119 (H. Sweet & Sons, London, 1885) ("A trespass upon a chattel consists in the taking, removing, or inflicting any injury upon it, however slight (a), without the consent of the owner and without lawful excuse (b) . . . in trespass a party is liable if he takes the chattel only for an instant. . . ."); Theodore Plucknett, *A Concise History of the Common Law* 368 (5th ed., 1956) (discussing

Medieval cases of tenants bringing replevin actions to return stolen livestock). *Cf. Entick v. Carrington*, 19 Howell's State Trials 1029 (1765) ("By the laws of England, every invasion of private property, be it ever so minute, is a trespass."). What the officer did in this case – lift the cover on the motorcycle – would constitute trespass to chattels under these well-established principles. *See* 3 Blackstone, *supra*, *153-54 (recognizing actions for trespass to chattels even where there is no breach of the peace with limited injury).

To the extent there is any difference on an effect's protection under the Fourth Amendment depending on *where* the effect is, that difference might depend on whether the effect is in a public space or is on private property that is closed to the public. In a public space, of course, the officer would not *already* be trespassing before he lifted the cover, as he would in an open field or the curtilage (unless there is an implied license, such as to knock on the door of a home). There also is the possibility that an officer might legitimately think an effect has been abandoned if left unattended in a public space, or that there is an implied license to search the effect, such as a jacket or wallet, so its owner can be identified and it can be returned. *See, e.g.*, *Abel v. United States*, 362 U.S. 217, 225 (1960) (search of incriminating evidence found in trash can in vacated hotel room did not need a warrant because it was abandoned); *California v. Greenwood*, 486 U.S. 35, 40-42 (1988) (curbside trash not protected by Fourth Amendment).

But none of those issues – the lawful presence of the officer, abandonment, or an implied license – arise for effects on private property that is not open to the public.[3]

First, the officer is already trespassing, whether it be in an open field or upon the curtilage. An officer's trespass in an open field may not be a Fourth Amendment violation under current law, but it is still a common law trespass. The search of an effect – unless a purely plain-view examination – is *another* trespass. One trespass – even if it be a trespass this Court believes constitutional – should not justify another one. In this case, the officer was already trespassing when he stood beside the motorcycle. The lifting of the cover should not receive a lower standard than it otherwise would because of this first trespass.

Second, an effect on private land that is not open to the public is very unlikely to be abandoned. If a stranger – whether an officer or private citizen – thought an effect might be abandoned or lost he would know he should first check with the possessor of the real property before helping himself to it. Indeed, in this case the officer could have simply knocked on Collins' door to inquire about the motorcycle – a motorcycle he believed was evidence in a criminal investigation – instead of searching it without a warrant. And no one

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[3] By "open to the public" *Amicus* means an area of private property where the owner has not given the public permission to enter.

could have reasonably believed that Collins had abandoned the motorcycle.

Therefore, the proper rule for the search of an effect on private land that is not open to the public should be that the police need a warrant to search the effect, absent some other exception (such as exigent circumstances). The open fields doctrine presents no reason to treat effects in "open fields" any differently than effects on the curtilage, or, indeed, in houses.[4] The doctrine therefore has no application to this case.

III. Under *California v. Carney*, the Vehicle Exception to the Warrant Requirement Does Not Apply in This Case.

Because the open fields doctrine cannot excuse the warrantless search of the motorcycle, the government must rely upon the automobile exception. But that, too, is unavailing, since the Virginia Supreme Court's ruling that the automobile exception authorized the government's actions directly conflicts with the plain language of *California v. Carney*, 471 U.S. 386 (1985). There, this Court explicitly held that the automobile exception applies only "[w]hen a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used

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[4] In this case, *Amicus*'s proposed rule for the search of effects dovetails with the positive law model, where Fourth Amendment rules for the police mirror those for private parties. *Cf.* William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 Harv. L. Rev. 1821, 1825-26 (2016).

for residential purposes." *Id.* at 392. *Carney*'s "residential purposes" language therefore echoes this Court's previous decision in *Coolidge v. New Hampshire*, wherein a majority held that the automobile exception could not justify a warrantless search of a vehicle parked in Coolidge's driveway. 403 U.S. 443, 479 (1971) (stating that facts of the case – an unoccupied vehicle located on Coolidge's property – took it outside the scope of the automobile exception laid out in *Carroll*).

The Virginia Supreme Court ignored this language, wrongly holding that *Carney* only concerned whether the automobile exception applied to a "fully mobile motor home." Other courts have similarly given *Carney*'s "residential purposes" language a stilted and limited reading by saying that it goes only to whether Carney's mobile home was being used as a residence or as a means of transport. *United States v. Reis*, 906 F.2d 284, 290-91 (7th Cir. 1990); *see also Harris v. State*, 948 So. 2d 583, 592 (Ala. Crim. App. 2006) (stating that with *Carney*'s "residential purposes" language, "the Court was addressing only the inapplicability of the exception as to motor homes set up on a site and used as a residence").

But nothing about the structure or language of *Carney* supports such a crabbed reading, or casts doubt on this Court's general statement regarding the contours of the automobile exception. First, it is important to recognize that the "residential purposes" language does not appear in any discussion of motor homes or Mr. Carney's case specifically. Instead, it comes immediately after a general discussion about the history of

the exception and its justifications, which in context gives strong evidence that it was meant to be a summation of general principles.

Second, this narrow post-hoc interpretation of *Carney* ignores that opinion's clear language. Throughout the opinion, this Court repeatedly used the term "motor home" when discussing either Mr. Carney's vehicle or motor homes generally. *See, e.g.*, 471 U.S. at 388, 389, 393, 394. By contrast, when this Court was talking about the automobile exception generally, it consciously chose to use generic terms like "vehicles" or "a vehicle." *See, e.g.*, 471 U.S. at 390, 391, 392, 393. Therefore, it is notable that when articulating the scope of the exception, this Court used that generic phrase, stating that the exception applies "when *a vehicle* is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes." *Id.* at 392 (emphasis added). In other words, this Court was making a general pronouncement about the law that applies to *all* vehicles, rather than to just motor homes. Lower courts instead chose to misread that language so as to artificially narrow *Carney*'s scope. This Court should correct those errors, which have reduced the scope of protection guaranteed by the Fourth Amendment, by reaffirming its statement in *Carney* and making clear in no uncertain terms that the automobile exception does not apply when an automobile is parked on private residential property.

CONCLUSION

In considering whether a warrant was required for the search at issue in this case, this Court should not give the open field doctrine any weight. Further, *California v. Carney* makes clear that the automobile exception to the warrant requirement does not apply to an automobile parked on private residential property. Because neither the automobile exception nor the open field doctrine applies, this Court should conclude that the search of the motorcycle, as an effect on private property not open to the public, required a warrant.

Respectfully submitted,

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No. 16-1027

In the Supreme Court of the United States

RYAN AUSTIN COLLINS, PETITIONER

v.

COMMONWEALTH OF VIRGINIA

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private

[1] All parties have consented to the filing of this amicus curiae. No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus curiae or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

criminal defense lawyers, public defenders, military defense counsel, law professors, and judges.

As the only nationwide professional bar association for public defenders and private criminal defense lawyers, NACDL has an interest in ensuring the fair and just development of constitutional principles that affect the proper, efficient, and just administration of criminal justice. To this end, NACDL files numerous amicus curiae briefs each year in this Court and other federal and state courts, seeking to provide assistance in cases that present legal and constitutional questions of particular significance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

This case presents a question of critical importance to NACDL and the clients its attorneys represent. At stake is the right of persons to be free from warrantless searches of their homes absent a factual showing of actual exigent circumstances.

SUMMARY OF THE ARGUMENT

This is an easy case. The heart of this case is not the police's warrantless search of a motorcycle. It is the police's preceding, warrantless invasion of petitioner's home. That invasion itself constituted a "search" under the Fourth Amendment. See *United States* v. *Jones*, 565 U.S. 400, 406 n.3 (2012) ("Where * * * the Government obtains information by physically intruding on a constitutionally protected area, [a Fourth Amendment] search has undoubtedly occurred."). Because that invasion did not comply with the Fourth Amendment, and because the officers "expoit[ed]" the illegal invasion by then immediately conducting a

search of what lay underneath an opaque motorcycle cover concealing from plain view the evidence that the police hoped to find, the evidence the police discovered from that secondary search is inadmissible fruit of a poisonous tree. *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963) (quoting John MacArthur Maguire, *Evidence of Guilt* 221 (1959)).

The relevant facts are not in dispute. A police officer wanted to know whether what lay underneath an opaque motorcycle cover was not just any motorcycle, but rather a motorcycle that he believed was evidence in a criminal investigation. The covered motorcycle, however, was not on a public roadway, but rather was on a private parking patio abutting the side of petitioner's home—an area that this Court's case law deems "curtilage" and "part of the home itself for Fourth Amendment purposes." *Florida* v. *Jardines*, 569 U.S. 1, 6 (2013) (quoting *Oliver* v. *United States*, 466 U.S. 170, 180 (1984)). Lacking a warrant, petitioner's consent, or any plausible exigent circumstances, the police chose to invade the curtilage anyway—walking up the driveway, past the home's front steps, and on to the parking patio—so that they could remove the motorcycle cover and see whether it had been concealing what the police had been looking for. This Court's precedents make clear that this warrantless invasion of petitioner's home violated the Fourth Amendment, and the fruits of that violation are subject to the exclusionary rule.

In nevertheless allowing the admission of the evidentiary fruits of the police's illegal invasion of petitioner's home, the Supreme Court of Virginia effectively endorsed the following principle: the police's war-

rantless invasion of a person's home will be excused so long as the purpose of the invasion was to search an automobile parked on the property. That principle cannot be reconciled with this Court's precedents. The decision below should be reversed.

ARGUMENT

I. THE POLICE'S WARRANTLESS INTRUSION INTO A HOME OR ITS CURTILAGE IS PRESUMPTIVELY UNCONSTITUTIONAL

"[W]hen it comes to the Fourth Amendment, the home is first among equals," and the "curtilage of the house * * * enjoys protection as part of the home itself." *Florida* v. *Jardines*, 569 U.S. 1, 6 (2013). The sanctity of that domestic space is the "very core" of the Fourth Amendment. *Ibid.* (quoting *Silverman* v. *United States*, 365 U.S. 505, 511 (1961)); see *United States* v. *U.S. Dist. Court for E. Dist. of Mich.*, 407 U.S. 297, 313 (1972) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."). Accordingly, with respect to that space, the exceptions to the warrant requirement are at their most narrow: any intrusion "without a warrant [is] presumptively unreasonable absent exigent circumstances." *United States* v. *Karo*, 468 U.S. 705, 715 (1984); see *Kyllo* v. *United States*, 533 U.S. 27, 31 (2001) ("With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.").

The Fourth Amendment's special concern with, and protection of, the home is rooted in the English common law principle that "the property of every man [is] so sacred" that if a man "will tread upon his neigh-

bour's ground, he must justify it by law." *United States* v. *Jones*, 565 U.S. 400, 405 (2012) (quoting *Entick* v. *Carrington*, 95 Eng. Rep. 807, 817 (C.P. 1765)). This Court has called this principle "'the true and ultimate expression of constitutional law' with regard to search and seizure." *Ibid.* (quoting *Brower* v. *Cty. of Inyo*, 489 U.S. 593, 596 (1989)); see *Boyd* v. *United States*, 116 U.S. 616, 626 (1886). Not surprisingly, then, the common law's heightened protection of the home against trespass was carried over into the very text of the Fourth Amendment, which specifically enumerates the "house[]" as a place that shall be free from "unreasonable searches and seizures." U.S. Const. Amend. IV.

Consistent with this "traditional property-based understanding of the Fourth Amendment," *Jardines*, 569 U.S. at 11, this Court's Fourth Amendment jurisprudence virtually always has "embod[ied] a particular concern" for protecting the home against "government trespass." *Jones*, 565 U.S. at 406; see also *Jardines*, 569 U.S. at 13 (Kagan, J., concurring) (describing the home as "the most private and inviolate (or so we expect) of all the places and things the Fourth Amendment protects"). Although "property rights are not the sole measure of Fourth Amendment violations," *Jardines*, 569 U.S. at 11—and a violation may occur even when the investigation does not take place in a constitutionally protected area—the Fourth Amendment's "property-rights baseline * * * keeps easy cases easy" where there *has* been a physical intrusion onto protected property, *ibid.* Because of the Fourth Amendment's basis in common law property rights and particular concern for the home, a "presumption of unreasonableness * * * attaches to" warrantless intrusions on a per-

son's home. *Welsh* v. *Wisconsin*, 466 U.S. 740, 750 (1984). This same presumption applies to warrantless searches of the curtilage, "the land immediately surrounding and associated with the home." *Oliver* v. *United States*, 466 U.S. 170, 180 (1984).[2] The curtilage is "'intimately linked to the home, both physically and psychologically,' and is [therefore also] where 'privacy expectations are most heightened.'" *Jardines*, 569 U.S. at 7 (quoting *California* v. *Ciraolo*, 476 U.S. 207, 213 (1986)). Accordingly, the curtilage "has been considered part of the home itself for Fourth Amendment purposes," *Oliver*, 466 U.S. at 180, and receives the same robust Fourth Amendment protections as the home's interior.

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[2] "The curtilage concept originated at common law to extend to the area immediately surrounding a dwelling house the same protection under the law of burglary as was afforded the house itself." *United States* v. *Dunn*, 480 U.S. 294, 300 (1987). At common law, "curtilage" was generally "defined by an American court to mean, 'a space necessary and convenient, and habitually used for the family purposes, the carrying on of domestic employments; it includes the garden, if there be one, and need not be separated from other lands by a fence.'" Joell Prentiss Bishop, *Commentaries on the Criminal Law* 217 (1858) (quoting *State* v. *Shaw*, 31 Me. 523, 523 (1850)). The curtilage therefore includes "the yard, or garden, or field, which is near to, and used in connection with, the dwelling." *Cook* v. *State*, 3 So. 849, 850 (Ala. 1888) (quoting *Ivey* v. *State*, 61 Ala. 58 (1878)). The parking patio here fits comfortably within this definition. Such outdoor spaces are used not merely to store one's automobile, but also for play, for social gatherings, and as a place to store other effects.

II. A Showing Of Exigent Circumstances Is Required To Justify A Warrantless Intrusion On A Person's Home Or Its Curtilage

If police officers lack a warrant or consent, then they need "exigent circumstances" to justify their "intrusion into the curtilage" of a person's home. *United States* v. *Carloss*, 818 F.3d 988, 1003 (10th Cir.) (Gorsuch, J., dissenting), cert. denied, 137 S. Ct. 231 (2016).[3] This Court has made clear that "exigent circumstances" is not an empty phrase that the police may invoke whenever they might find it inconvenient to obtain a warrant or consent to a search. Rather, "'the exigencies of the situation' [must] make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey* v. *Arizona*, 437 U.S. 385, 394 (1978) (quoting *McDonald* v. *United States*, 335 U.S. 451, 456 (1948)).

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[3] There can be no serious contention here that petitioner consented to the police's intrusion of the parking patio to rummage underneath the motorcycle cover. The record makes clear that the portion of the parking patio on which the covered motorcycle was located was beyond the point where an impliedly invited visitor, such as a Girl Scout, would walk to access the front door. Moreover, after intruding on that portion of the parking patio, the police did not merely glance around. Rather, they took the subsequent step of lifting the cover off the motorcycle so that they could see things that were not in plain view. See *Florida* v. *Jardines*, 569 U.S. 1, 9 (2013) ("The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose."). In short, it is clear that the officers did more "than any private citizen might" with respect to petitioner's home and its curtilage, and therefore exceeded the scope of any implied license. *Id.* at 8 (quoting *Kentucky* v. *King*, 563 U.S. 452, 469 (2011)).

"[T]he burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries." *Welsh* v. *Wisconsin*, 466 U.S. 740, 750 (1984).

The circumstances that this Court has described as sufficiently exigent to justify a warrantless intrusion of the home demonstrate how narrow the exception is. The Court has held, for example, that officers may enter the home without a warrant to "fight a fire and investigate its cause, to prevent the imminent destruction of evidence, to engage in 'hot pursuit' of a fleeing suspect, * * * [and] to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Brigham City* v. *Stuart*, 547 U.S. 398, 403 (2006) (internal citations omitted) (quoting *United States* v. *Santana*, 427 U.S. 38, 42, 43 (1976)). In simple terms, unless they have a warrant or consent, the police cannot "enter the curtilage to conduct an investigation * * * absent an emergency." *Carloss*, 818 F.3d at 1004 (Gorsuch, J., dissenting).

III. An Automobile's Inherent Mobility, In And Of Itself, Is Not A *Per Se* Exigent Circumstance Justifying A Warrantless Intrusion On The Home Or Its Curtilage

The Supreme Court of Virginia held that it did not need to "independently assess whether exigent circumstances existed here," because in its view "the automobile exception is a distinct and independent exception to the warrant requirement" that justified the police's actions here, including the police's warrantless invasion of the curtilage of petitioner's home in order to access

the covered vehicle. Pet. App. 13-14. That holding runs contrary to this Court's precedent.

In *South Dakota* v. *Opperman*, the Court drew a "distinction between automobiles and homes or offices in relation to the Fourth Amendment." 428 U.S. 364, 367 (1976). The Court stated the "reason for this well-settled distinction is twofold." *Ibid.* "First, the inherent mobility of automobiles" presents an "exigency." *Ibid.* (citing *Carroll* v. *United States*, 267 U.S. 132, 153-154 (1925)). Second, "less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that related to one's home or office." *Ibid.* The Court in *Opperman* made clear that this second rationale—that a person simply expects less privacy with respect to an automobile than with respect to the home—is an essential piece of the automobile exception's constitutional foundation. See *ibid.* (recognizing that the automobile exception may apply even "where no immediate danger was presented that the car would be removed from the jurisdiction").

Put another way, the Court's automobile exception cases at least implicitly recognize that whatever "exigency" a parked (or, in this case, parked and covered) automobile's inherent mobility presents, it is not the type of "emergency" that by itself justifies a warrantless search *per se*. Cf. *Kentucky* v. *King*, 563 U.S. 452, 470 (2011) ("Any warrantless entry based on exigent circumstances must, of course, be supported by a genuine exigency."); cf. also David E. Steinberg, *The Drive toward Warrantless Auto Searches: Suggestions from a Back Seat Driver*, 80 B.U. L. Rev. 545, 570 (2000). Instead, the automobile exception springs from the *com-*

bination of that lesser form of exigency with the owner's reduced expectation of privacy. Where, as here, the circumstances did not present a true, *bona fide* "emergency," the question thus becomes whether the police's search implicated only a diminished expectation of privacy. The Court has explained that a person has a diminished expectation of privacy in a vehicle that is stationed on a public roadway or "in a place not regularly used for residential purposes." *California* v. *Carney*, 471 U.S. 386, 392 (1985). The Court has never held, nor even suggested, that a person also has such a diminished expectation of privacy in an automobile parked within the curtilage of the home that the police would be entitled to invade the curtilage without a warrant in order to gain access to the automobile. To the contrary, privacy interests are at their zenith where the home, including its curtilage, is concerned. See pp. 4-6, *supra*.

The decision below depended on at least one of the following two analytical errors with respect to the automobile exception: First, the Supreme Court of Virginia may have mistakenly believed that the inherent mobility of a vehicle (even one being stored underneath a cover) presents the type of emergency that constitutes "exigent circumstances," and is thus sufficient by itself to justify the officers' warrantless intrusion of the curtilage of petitioner's home.[4] Second, the Supreme

---

[4] The Supreme Court of Virginia suggested that this was in fact not its rationale. See Pet App. 13-14 ("[W]e do not find it necessary to independently assess whether exigent circumstances existed here. Rather, the facts of this case are more properly addressed by a different exception to the warrant requirement: the automobile exception."); Pet. App. 18 (declining to consider

Court of Virginia may simply have ignored that the officers' access to the covered motorcycle was entirely predicated on their immediately preceding trespass on the curtilage of petitioner's home. Neither rationale withstands scrutiny. If the automobile exception were allowed to take priority over the Fourth Amendment protections that the home enjoys—which is to say, if the Fourth Amendment allowed a police officer to trespass on a person's home or its curtilage in order to effectuate a search of an automobile—logically it would not matter whether the automobile was parked on an uncovered parking patio (as here), in a covered carport, in a fully-fenced area, an enclosed garage detached from the home, or even an enclosed garage attached to the home.[5] The notion, however, that police officers are permitted to break into even an enclosed garage attached to the home—a space that most homeowners likely would consider a literal part of the home's interior—in order to effectuate a search of an automobile parked therein offends fundamental Fourth Amendment principles.

"whether the motorcycle was immediately mobile at the precise moment of the search" because the automobile exception's "bright-line test does not require us to hypothesize whether it would have been technically possible for Collins to uncover the motorcycle, start the engine, and flee from Officer Rhodes").

[5] Indeed, one might ask if the Supreme Court of Virginia's logic would extend to a motorcycle stored in petitioner's living room. Drawing a distinction between that case and the present one would require drawing a distinction between the Fourth Amendment protection afforded the home and curtilage that this Court has never endorsed.

Equally contrary to the Fourth Amendment would be a rule permitting some but not other trespasses predicate to an automobile search, *e.g.*, a rule that would permit a trespass on a home's side parking patio but not of a home's attached, enclosed garage. For Fourth Amendment purposes, people enjoy the same protections from physical intrusions onto the curtilage—which "enjoys protection as part of the home itself," *Jardines*, 569 U.S. at 6—whether their curtilage is comprised of a small parking patio or a large garage. As the Court has put it, "the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion." *United States* v. *Ross*, 456 U.S. 798, 822 (1982). Discriminating between invasions on the curtilage would almost certainly result in wealthy persons enjoying more robust Fourth Amendment protections than those of more modest means. Indeed such a rule would have a disproportionate impact on clients of NACDL's members. NACDL's members provide criminal defense services for many indigent clients who do not have enclosed garages due to a variety of economic and socioeconomic factors.

This Court has made clear that the Fourth Amendment protections do not depend on someone's means or socioeconomic status. Cf. *Ross*, 456 U.S. at 822 (explaining that a "traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim[s] an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case"). Any rule that tried to make such distinctions like those between a parking patio, carport, or an enclosed garage would un-

doubtedly run counter to this Court's longstanding principles. "We have, after all, lived our whole national history with an understanding of 'the ancient adage that a man's house is his castle to the point that the poorest man may in his cottage bid defiance to all the forces of the Crown.'" *Georgia* v. *Randolph*, 547 U.S. 103, 115 (2006) (alteration omitted) (quoting *Miller* v. *United States*, 357 U.S. 301, 307 (1958))).

* * * * *

As noted above, this is an easy case. Without a warrant or petitioner's consent (express or implied), the police trespassed on the curtilage of petitioner's home in order to look underneath a motorcycle cover that was covering some type of motorcycle. For Fourth Amendment purposes, this is indistinguishable from the facts in *Florida* v. *Jardines*, where the officer was able to "gather[] * * * information" only by first "physically entering and occupying" the curtilage of the home without being "explicitly or implicitly permitted by the homeowner." 569 U.S. 1, 5-6 (2013). As *Jardines* holds, this is precisely what the Fourth Amendment prohibits.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

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NOVEMBER 2017

No. 16-1027

In the Supreme Court of the United States

RYAN AUSTIN COLLINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF AMICUS CURIAE THE NATIONAL RIFLE ASSOCIATION FREEDOM ACTION FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Rifle Association Freedom Action Foundation ("Freedom Action Foundation") is a public charity dedicated to provision of non-partisan Second Amendment education to all American citizens. The Freedom Action Foundation's primary mission is to ensure that gun-owners are registered to vote and educated about issues that affect their fundamental rights. The Freedom Action Foundation has a strong interest in ensuring that this Court's decision properly respects the fundamental role the sanctity of the home plays in safeguarding many of our constitutional rights, including not only the right against unreasonable searches and seizures, but also the right to keep and bear arms in defense of oneself, one's family, and one's home.

SUMMARY OF ARGUMENT

Ryan Austin Collins was convicted in the circuit court of Albemarle County on charges related to his dealings with a stolen motorcycle. Collins's arrest and prosecution stemmed from a search of the motorcycle in question, while it was parked in his yard, in a partially enclosed structure a few feet from his house.

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[1] Pursuant to SUP. CT. R. 37.3(a), amicus certifies that all parties have given written consent to the filing of this brief. Pursuant to SUP. CT. R. 37.6, amicus certifies that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amicus, its members, or its counsel made such a monetary contribution.

Collins sought to suppress the evidence yielded by that search on the grounds that it had been obtained in violation of the Fourth Amendment, in a warrantless search of the curtilage around his home. The Supreme Court of Virginia rejected that argument, holding that the "warrantless search of the motorcycle was justified under the automobile exception to the warrant requirement of the Fourth Amendment," notwithstanding the fact that the "automobile" was parked within the curtilage of Collins's home. *Collins v. Commonwealth*, S.E.2d 611, 617 (Va. 2016).

1. The Virginia Supreme Court's holding encroaches upon one of the central liberties that the Fourth Amendment was meant to protect: the sanctity of the home. The home is the sphere where a person's interests in property and privacy coincide, and it is therefore also the sphere in which that person has the strongest right to be secure against unwarranted search and seizure. Pre-revolutionary caselaw in England and the Colonies reveals widespread antagonism against certain investigative techniques employed by the Crown's agents. That antagonism fueled efforts to ensure that the newly formed American government would not have the power to violate "the sanctity of a man's home and the privacies of life." *Boyd v. United States*, 116 U.S. 616, 630 (1886). Drawing upon the adage, ancient even then, that a man's house is his castle, the ratifiers of the Fourth Amendment sought to ensure that the home would remain a sanctuary against unwelcome intrusion, even by the govern-

ment. *See* WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602–1791, at lix (2009). Whatever arguments from prudence may underwrite the automobile exception, allowing the exception to swallow up the protection at the heart of the Fourth Amendment would be a betrayal of its animating principles.

2. Allowing the police to conduct a warrantless search of a vehicle within the curtilage of Petitioner's home also ignores the fundamental role the sanctity of the home has played in the development of many of our other constitutional rights. The Fourth Amendment does not stand alone in safeguarding a citizen's rights in his own home against all but the most compelling justifications for intrusion. The primacy of the home also forms the cornerstone of several other fundamental constitutional liberties, including the right to armed self-defense protected by the Second Amendment. The scope of the protection of the home in the Fourth Amendment context has long been informed by these related constitutional protections, and the Court should look to them for guidance in deciding the question presented in this case. In particular, the case-law in the context of the right to self-defense demonstrates that the protection afforded the home should extend to the area within the curtilage of the home where the search at issue in this case occurred.

ARGUMENT

When the police entered Collins's property to search a motorcycle parked next to his house, they encroached on a sphere that has traditionally commanded the highest level of protection against public and private intrusion—the home and the "curtilage," or the area and structures immediately surrounding it. Since long before the founding of the American Republic and the ratification of the Fourth Amendment, our legal traditions understood this space to be inviolable—a principle so well accepted as to have become embedded in a maxim still heard today: "a man's house is his castle." Early backlash against government searches of the home was the forge in which the right against unreasonable searches was first fashioned. To the extent traditional protections of private property against trespass continue to have any role in shaping modern Fourth Amendment doctrine, the warrantless search of Collins's home in this case cannot stand.

This conclusion is bolstered by the fundamental role the inviolability of the home has played in the development of many other of our constitutional rights, especially the right to armed self-defense that stands at the core of the Second Amendment. There, too, our traditions have long viewed the home as special. This Court's consideration of this case should be informed by these other constitutional rights.

I. The History of the Right Against Unreasonable Searches and Seizures Demonstrates that that Right Has Its Highest and Most Urgent Application in the Home.

A. The Fourth Amendment Has Its Roots in the Legal and Political Backlash Against the Crown's Inspection of Private Homes in the Period Leading to the American Revolution.

The history leading to the ratification of the Fourth Amendment demonstrates that the Amendment's first and highest purpose is to protect the sanctity of the home. During the years leading up to the American Revolution, there was widespread discontent with a set of English practices related to government inspections of private homes. The threat of general warrants, especially in connection with charges of seditious libel and with inspections related to excise taxes, allowed the Crown's writ-bearing agents almost complete freedom to hammer in the doors of houses. With few exceptions, the King's magistrates were free to look anywhere and seize anything. William Cuddihy & B. Carmon Hardy, *A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution*, 37 WM. & MARY Q. 371, 372 (1980).

As the number of items taxable under the excise grew during the eighteenth century, so did the scope of the exciseman's authority. "When an item became taxable under the excise, the houses of everyone

whose occupation was concerned with it became subject to search." *Id.* at 382. For instance, in 1763, cider for private use appeared on the excise list. Since cider was almost universally made and consumed throughout England, the addition drastically increased the scope of excise searches. The proposal evoked wide popular outrage. The London city government claimed that exposing private houses to capricious search was a "badge of slavery" more indicative of despotic governments than England. CUDDIHY, THE FOURTH AMENDMENT at 467.

In a series of cases, English constitutional jurisprudence responded to these concerns, crystallizing the rights against unreasonable government searches and seizures that the Framers would later inscribe into the Fourth Amendment.

1. The *Wilkes Cases*

The foundational sources from the pre-Revolutionary period for the legal structure undergirding the Fourth Amendment were the so-called *Wilkes Cases* (1763–1769). In 1763, *The North Briton*, an opposition newspaper, published an anonymous condemnation of the secretaries of state as "wretched" puppets of Lord Bute, "foul dregs of his power and the tools of corruption and despotism." No. 45 (Sat., 23 Apr. 1760), *North Briton* (1763), vol. 2, pp. 227, 235 (*quoted in* CUDDIHY, THE FOURTH AMENDMENT at 440). Lord Halifax, secretary of state, signed a general search warrant authorizing the Crown's agents to locate the authors, printers, and publishers of the paper. After a number of

searches and interrogations, it was discovered that John Wilkes was the author of the paper. Wilkes was arrested, and his house subjected to search.

Wilkes and his co-workers brought numerous actions for trespass against those involved in conducting the search. In *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763), Huckle, a journeyman of the printer, brought suit claiming trespass and false imprisonment by the King's messengers. The jury found for Huckle, and Charles Pratt, Chief Justice of the Court of Common Pleas, wrote:

> To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject.

Huckle, 95 Eng. Rep. at 769. In *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763), Wilkes brought a suit in trespass against Robert Wood, the undersecretary of state who had been present during the search of Wilkes's house. Wilkes argued that the primary freedom at stake was the sanctity of his home: "[i]n vain has our house been declared, by the law, our asylum and defence, if it is capable of being entered, upon any frivolous or no pretence at all, by a Secretary of State." *Id.* at 490. Chief Justice Pratt once again opined against the King's agents, holding that there was no right "to force persons' houses, break open escrutores,

seize their papers, upon a general warrant." *Id.* at 498.

2. *Entick v. Carrington*

Two years later, Chief Justice Pratt, recently made Lord Camden, confronted the same issue in *Entick v. Carrington*, 19 Howell's St. Trials 1029 (C. P. 1765). As this Court recognized in *United States v. Jones*, 565 U.S. 400 (2012), *Entick* furnished early American courts with a common law framework for questions of search and seizure. John Entick brought an action in trespass against four of the King's messengers who had searched Entick's home for books and papers related to a charge of seditious libel. The messengers conducted their search under the authority of a general warrant issued by secretary of state Lord Halifax. Holding for Entick, Lord Camden observed that the common law offered no justification for the actions of the messengers and rejected the proposition that the Crown could enter its subjects' domiciles at will: "every invasion of private property, be it ever so minute, is a trespass." *Id.* at 1066. For the subsequent jurisprudence of American courts, *Entick* stood for the proposition that it was not the physical break-in or the rummaging in drawers that constituted the essence of potential government overreach, but rather the invasion of the indefeasible rights of personal security, liberty, and private property. *See Boyd*, 116 U.S. at 630 (noting that Lord Camden's opinion laid down the basic principles of the Fourth

Amendment). *See also* Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1198 (2016).

3. *Paxton's Case*

In the Colonies, *Paxton's Case* (1761) and the remarks of James Otis provide the clearest articulation of the widespread disapprobation of the Crown's investigative methods. The controversy emerged in 1755 when the governor of Massachusetts began issuing writs of assistance to customs officers in an attempt to prevent illegal trade with Canada. Charles Paxton, a customs officer, asked the Superior Court for the first such writ in June of 1755. In 1761, members of the "Society for Promoting Trade and Commerce Within the Province" petitioned the Superior Court of Massachusetts to enjoin the use of the writs. CUDDIHY, THE FOURTH AMENDMENT at 381.

James Otis, a young Massachusetts lawyer, argued that "one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle . . . . He is as well guarded as a prince in his castle. This writ [of assistance] . . . would totally annihilate this privilege." Brief of James Otis, *Paxton's Case* (Ma. Sup. Ct. 1761). Although the court would find for Paxton and issue the writ, Otis and his arguments against the practices of the Crown galvanized popular opposition to generalized invasions of private homes by the government. "He not only identified the need for sanctuary and immunity in the home with private property and natural law but also

provoked a Revolutionary determination." Cuddihy & Hardy, *A Man's House Was Not His Castle* at 394. John Adams, then a member of the audience, remarked: "Every man of a crowded Audience appeared to me to go away, as I did, ready to take up Arms against Writs of Assistants." M. H. SMITH, THE WRITS OF ASSISTANCE CASE 262 (1978).

B. In Its Original Context, the Fourth Amendment Was Meant Principally To Protect the Sanctity and Privacy of American Homes.

Lord Camden's holding in *Entick* influenced the drafters of the Fourth Amendment, who placed its protections of the home against general warrants on a constitutional footing. *See* Richard A. Epstein, Entick v. Carrington *and* Boyd v. United States*: Keeping the Fourth and Fifth Amendments on Track*, 82 U. CHI. L. REV. 27, 32 (2015). "In 1787–88, commentators on the Constitution denounced general warrants and searches not just because they were general but because they abridged the security that houses afforded from unwelcome intrusion. That houses were castles was the most recurrent theme of those commentaries." CUDDIHY, THE FOURTH AMENDMENT at 766. The Antifederalists feared that a Constitution without a prohibition on unreasonable search and seizure would subject "houses, those castles considered sacred by English law . . . to the insolence and oppression of office." *To the People of Maryland*, p. 2, col. 1. " 'A Farmer' considered general warrants intolerable be-

cause a citizen's house was his 'asylum' and 'sanctuary.'" *Maryland Gaz.: or the Baltimore Advtr.*, Fri., 15 Feb. 1788 (vol. 5, no. 351), p. 2, col. 2 (*quoted in* CUDDIHY, THE FOURTH AMENDMENT at 766).

C. This Court's Precedents Confirm that the Fourth Amendment's Highest Purpose Is To Defend the Sanctity of the Home.

The early decisions of American courts further demonstrate that the Fourth Amendment's first and highest purpose is the protection of the home. In *Boyd v. United States*, 116 U.S. 616 (1886), this Court, relying upon the opinion of Lord Camden in *Entick v. Carrington*, held that the principles articulated in it "affect the very essence of constitutional liberty and security." *Boyd*, 116 U.S. at 630. The Court found that the Fourth Amendment applied "to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life." *Id.*

> It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense . . . .

Id.

The centrality of the home for the Fourth Amendment has also been recognized in more recent opinions

of this Court. Holding that encroaching upon the respondent's porch with a drug-sniffing dog constituted an unwarranted search within the curtilage of the home, this Court noted that "when it comes to the Fourth Amendment, the home is first among equals. At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

While the "reasonable expectations of privacy" test this Court crafted in *Katz v. United States*, 389 U.S. 347 (1967), seemed for a time to shift the focus of Fourth Amendment jurisprudence off of traditional, trespass-based ideas of the inviolability of the home, this Court's more recent jurisprudence has clarified that the traditional rules of property law continue to inform the scope of the Constitution's protection against unreasonable searches and seizures. *See Jones*, 565 U.S. at 406–08. Under the approach adopted by this Court's holding in *Jones*, it is plain that Virginia erred in sanctioning the search of Collins's home in this case. For as shown above, if *any* principle was an undisputed part of "that degree of privacy against government that existed when the Fourth Amendment was adopted," *id.* at 406, it is that in the ordinary course, the Government must obtain a warrant before intruding upon the sanctity of a man's home to search for evidence of wrongdoing.

II. The Sanctity of the Home Also Plays a Central Role in Safeguarding Many of Our Other Fundamental Constitutional Freedoms.

The Fourth Amendment tradition is not alone in according the most fundamental protection to the sanctity of the home. Many other constitutional rights—including, most prominently, the right to armed self-defense that is "the *central component*" of the Second Amendment, *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008)—also safeguard the home against public or private intrusion. This Court's determination of the scope of the Fourth Amendment's protection of the home in this case should be informed by the protections afforded the home in the context of these other fundamental rights.

A. The Right to Armed Self-Defense—the Central Component of the Second Amendment—Applies with Full Force Within the Home.

The inviolability of the home has been central to Anglo-American understandings of the right to armed self-defense for centuries. This is perhaps best illustrated by the ancient common-law "castle doctrine."

In seventeenth- and eighteenth-century English law, killing another in self-defense was ordinarily not lawful except "in sudden and violent cases when certain and immediate suffering would be the consequence of waiting for the assistance of the law," such

that the one killing in self-defense "had no other possible (or, at least, probable) means of escaping from his assailant." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *184 (Coleridge ed., 1825). But as Sir Matthew Hale explained in his influential treatise, this "duty to retreat" had no application where a criminal invaded a man's house; for one "being in his own house need not fly, as far as he can, as in other cases of *se defendendo*, for he hath the protection of his house to excuse him from flying." 1 SIR MATTHEW HALE, HISTORIA PLACITORUM CORONAE 486 (Sollom Emlyn ed., 1736). After all, as Lord Coke put it, "a man's house is his castle, *et domus sua cuique est tutissimum refugium* [and the home of each man is his safest refuge]." SIR EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 162 (4th ed. 1669) (1644).

Blackstone's Commentaries explain this doctrine in a way that sharply underscores how fundamental the protection of the home was to the English law of this period. "[T]he law of England," Blackstone emphasized,

> has so particular and tender a regard to the immunity of a man's house, that it styles it his castle, and will never suffer it to be violated with impunity; agreeing herein with the sentiments of antient Rome, as expressed in the words of Tully; *quid est sanctius, quid omni relegione munitius, quam domus uniuscujusque civium?* [What is

> more sacred, what is better secured by all religion, than each citizen's house?]

BLACKSTONE'S COMMENTARIES, *supra*, at *223. And thus, Blackstone concluded, when a man secure in his own home is confronted by a housebreaker, the law protects his "natural right of killing the aggressor, if he can." *Id.*

This inviolable right to safety and security in the home was protected with no less fervor on this side of the Atlantic. As James Wilson, a leading Framer and Supreme Court Justice, explained in his widely read Lectures on Law, "every man's house is deemed, by the law, to be his castle." 3 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON 85 (1804). Accordingly, "[h]omicide is enjoined, when it is necessary for the defence of one's . . . house," and "one may assemble people together in order to protect and defend his house." *Id.* at 84–85.

The early American cases steadfastly adhere to this rule. A jury charge in an early Pennsylvania case, for example, explained that "a dwelling-house" was a "castle for family defence; and that a homicide in resistance of a felony is justifiable, especially if committed in the night." *Donoghue v. Philadelphia Cty.*, 2 Pa. 230, 231 (1845). The Louisiana Supreme Court likewise noted that there were "cases of forcible trespass which would justify a homicide necessary to prevent it: as for example, in the defence of a man's house, which is his castle, against a forcible entry so violent as to require this extreme resort." *Carmouche v.*

Bouis, 6 La. Ann. 95, 97 (1851). The Supreme Court of California explained that "[e]very man's house, in this country, is his castle, and no one has a right to invade it without his consent. And if he shall attempt it, he has a right to use as much force as may be necessary to prevent it." *People v. Rodriguez*, 10 Cal. 50, 54 (1858). And the Michigan Supreme Court declared that while ordinarily homicide was excusable as self-defense only where "serious bodily harm of a permanent character" was "unavoidable by other means," "[a] man is not, however, obliged to retreat if assaulted in his dwelling, but may use such means as are absolutely necessary to repel the assailant from his house, or to prevent his forcible entry, even to the taking of life." *Pond v. People*, 8 Mich. 150, 177 (1860).

The sanctity of the home has thus long played a fundamental role in shaping Anglo-American understandings of self-defense. And these understandings, in turn, inform the meaning of the Second Amendment right to keep and bear arms. After all, self-defense, this Court has explained is "the *central component* of the [Second Amendment] right." *Heller*, 554 U.S. at 599. It is thus no surprise that this Court first enforced the individual right to bear arms against a ban on keeping firearms *in the home*. *Id.* at 628.

B. Throughout History, the Shared Importance of the Home to Both the Right to Self-Defense and the Right Against Unreasonable Searches Has Informed the Scope of Both Protections.

From the very beginning, the law has also recognized that the right to self-defense—safeguarded by the Second Amendment—*shares* this overriding solicitude for the home with the Fourth Amendment right against unreasonable searches and seizures. The history and shape of each right thus, to some extent, informs the scope of the other.

This is evident from the King's Bench's 1604 decision in *Semayne's Case*, 77 Eng. Rep. 194 (K.B. 1603). Lord Coke's report of that decision still stands as perhaps the most memorable articulation of the importance of the home in Anglo-American law, and it is often cited as the source of the phrase "a man's house is his castle." Importantly, the decision's primary analytical move is to draw on principles of self-defense doctrine to define the right against government searches.

Peter Semayne was a creditor to one George Berisford, who resided in a house in Blackfriars, London, with a joint tenant, Richard Gresham. Berisford died in debt to Semayne, and Semayne sought to recover on the debt by taking possession of certain goods that Berisford's had owned when he died—and that were still kept in the house he had shared with Gresham. To that end, Semayne secured a writ for the

Sheriff of London to seize the goods in question from the house in Blackfriars—which Gresham now owned outright and still occupied. But when the Sheriff arrived in Blackfriars to execute the writ, Gresham refused to allow him to enter the home. Semayne sued Gresham for frustrating the execution of the writ. *Id.* at 194–95.

The King's Bench decided against Semayne—and took the occasion to broadly state the fundamental status of the home in English law. The court began with the protections afforded the home in the law of manslaughter:

> the house of every one is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose; and although the life of man is a thing precious and favoured in law . . . if thieves come to a man's house to rob him, or murder, and the owner or his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing.

Id. at 195. Because a man's house was accorded such fundamental protection by the criminal law, the court reasoned, "it is not lawful for the sher[iff] . . . to break [someone's] house . . . to execute any process at the suit of any subject,"

> for thence would follow great inconvenience that men as well in the night as in the day should have their houses (which are their

> castles) broke, by colour whereof great damage and mischief might ensue; for by colour thereof, on any feigned suit, the house of any man at any time might be broke when the defendant might be arrested elsewhere, and so men would not be in safety or quiet in their own houses[.]

Id. at 198. Accordingly, only where a sheriff sought to execute "the K[ing's] process" could he enter one's house without their consent—and even then, "he ought to signify the cause of his coming, and to make request to open doors." *Id* at 195.

The implications of this interplay between the right to home-defense and the right against government searches of the home have continued to influence this Court's case law. In particular, those implications have shaped the development of the principle that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States Dist. Court E. Dist. Mich.*, 407 U.S. 297, 313 (1972). For example, when this Court held in *Payton v. New York* that the police generally must obtain a warrant to enter a suspect's home, without consent, in order to make an arrest, it relied heavily on "the tenet that 'a man's house is his castle,' " citing extensively from *Semayne's Case* and Otis's speech against the writs of assistance. 445 U.S. 573, 596–97 & nn.44, 45 (1980). And in *Georgia v. Randolph*, in the course of ruling that this requirement does not give way when a house is shared by two tenants and only one of them consents to the police's

entry, this Court again emphasized that we have "lived our whole national history with an understanding of 'the ancient adage that a man's house is his castle [to the point that t]he poorest man may in his cottage bid defiance to all the forces of the Crown.' " 547 U.S. 103, 115 (2006) (quoting *Miller v. United States*, 357 U.S. 301, 307 (1958) (alteration in original).

C. The Sanctity of the Home Also Forms the Foundation of Several Other Constitutional Protections.

The Second and Fourth Amendments are not the only constitutional protections that are fundamentally informed by the historic inviolability of the home. Perhaps unsurprisingly, "the ancient adage that a man's house is his castle," *Miller*, 357 U.S. at 307, in fact forms the foundation stone of several of our fundamental rights.

Most obviously, the sanctity of the home undergirds the oft-neglected Third Amendment right against the quartering of soldiers "in any house, without the consent of the Owner." U.S. CONST. amend. III. While that constitutional provision is often dismissed as obsolete, the right has perhaps been litigated so infrequently *precisely because*—due to the sanctity of the home—the right against quartering "is so thoroughly in accord with all our ideas," SAMUEL F. MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 646 (1893), that it is "hard to imagine why any government ever contemplated putting its troops in private homes," Robert A. Gross, *Public and Private*

in the Third Amendment, 26 VAL. U.L. REV. 215, 215 (1991).

The forcible quartering of soldiers in private homes was no less an affront to the prevailing understanding of the inviolability of the home in the eighteenth century when the Third Amendment was adopted. When King Charles I resorted to quartering his troops in English homes in the 1600s, he "was denounced as a tyrant," and Parliament was led to include a complaint against the practice in the 1628 Petition of Right. *Id.* at 217. When England imposed the same practice on the American Colonies through the Quartering Act of 1775, the response was no less impassioned—indeed, the Declaration of Independence lists the offense of "quartering large Bodies of Armed Troops among us" as one of the justifications for "dissolv[ing] the Political Bands" between America and England. The memory of the offense also impelled the Founders to enact the Third Amendment—which, as Joseph Story remarked, "secure[s] the perfect enjoyment of that great right of the common law, that a man's house shall be his own castle, privileged against all civil and military intrusion." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 747 (1833).

This "great right of the common law", *id.*, has also informed the scope of the First Amendment. In *Stanley v. Georgia*, this Court held that this provision prevented the State from "regulating obscenity . . . in[ ] the privacy of one's own home." 394 U.S. 557, 565 (1969). The right to Free Speech, the Court reasoned,

"takes on an added dimension" in "the context of . . . the privacy of a person's own home." *Id.* at 564. "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." *Id.* at 565.

Finally, the sanctity of the home has also been one of the cornerstones of the right to privacy that this Court has recognized implicit in the Constitution. In their famous law-review article on the right to privacy, for example, Warren and Brandeis emphasized that "[t]he common law has always recognized a man's house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 220 (1890). The protection afforded the home is thus a central part of our constitutional tradition, forming the foundation of not only the Fourth Amendment's right against unreasonable searches and seizures, but also the fundamental rights protected by the freedom of speech, the right to keep and bear arms, and the right to privacy. Accordingly, this Court should not lightly override Petitioner's interest in the sanctity of his home in this case.

D. The Scope of the Protection Afforded the Home in the Context of Armed Self-Defense Extends to Locations Adjacent to the Home, Such as the One at Issue in This Case.

Cases articulating the scope of the castle doctrine in the context of armed self-defense shed light on the specific issue in this case: the extent to which the protection accorded the home extends to the property or outbuildings immediately adjacent to the home itself, such as the structure adjacent to the home in which the motorcycle at issue in this case was parked. As numerous decisions from the self-defense case-law show, a homeowner who was *assailed by a home-invader* from the same position where the motorcycle in this case was parked would have plainly been protected by the castle doctrine, in those States where that doctrine still prevails.

An early decision in point is *Haynes v. State*, 17 Ga. 465 (1855). In that case, Dennis Haynes was arrested and tried for murdering James Griggs, when Griggs had assaulted him by throwing stones at him when he had come out of his house to draw water from a nearby well on the property. *Id.* at 482. The trial court had charged the jury that the well where the altercation took place was properly considered part of Haynes's "habitation," since the protections of the home extended to not only "a dwelling, [but] kitchen or buildings contiguous to the dwelling. A store-house, even if the owner do not live in it at the time; and even a well, if in the curtilage," was to be considered part

of the home itself. *Id.* at 473. Though he was within the curtilage of the house when assaulted, the court instructed the jury that Haynes had no right to kill Griggs unless the latter had come onto the property to commit a felony. *Id.* On appeal, the Georgia Supreme Court agreed that the well in question was properly considered part of Hanes's home, but it disagreed that "the doctrine of *retreat*" was "applicable to this case." *Id.* at 483.

> If Haynes was entitled to the joint use and occupation of the well, and he went there to draw water for his family, was he bound to retreat therefrom, because violently assaulted by Griggs? And does his justification depend upon that? Must one retreat from his house or his family, and leave the former to the occupancy and the latter to the tender mercies of the aggressor? Such is not our understanding of the rights of a citizen.

Id.

Four decades later, this Court reached a similar interpretation of the scope of the castle doctrine, in *Beard v. United States*, 158 U.S. 550 (1895). Beard had been convicted of murdering Will Jones, after Jones and his brother John had entered Beard's property, armed, and attempted to steal Beard's cow. Beard confronted the Jones brothers in an " 'orchard lot,' a distance of about 50 or 60 yards from his house," *id.* at 552, ultimately killing one of the assailants who drew a pistol from his pocket. This Court held that

Beard had acted in self-defense, concluding that he was not "under any greater obligation when on his own premises, near his dwelling house, to retreat or run away from his assailant, than he would have been if attacked within his dwelling house," since the lot in question "constitute[ed] a part of his residence and home." *Id.* at 559–60.

These cases were consistent with the rule America had inherited from England. At common law, a person had the right to defend his home against a burglar—and not just the main dwelling place, but also "the out houses adjoining to the principal house." 3 WILSON, *supra*, at 64 (emphasis omitted). As Blackstone explained, the right to defend oneself against a burglar extended not just to the "mansion-house" proper, but also to "the barn, stable, or warehouse, [if it] be parcel of the mansion-house and within the same common fence, though not under the same roof or contiguous" since "the capital house protects and privileges all its branches and appurtenants, if within the curtilage or home-stall." BLACKSTONE'S COMMENTARIES, *supra*, at *225.

While the modern trend has been to abandon the castle doctrine in favor of a more general right to self-defense—without a "duty to retreat"—whenever a person is assailed in a place where he has a right to be, many States still retain a general duty to retreat and an exception for self-defense within the home. And those States continue to draw the same line as these early authorities—the protections of the home

extend to adjacent, exterior areas within the curtilage.

In *State v. Frizzelle*, for example, the North Carolina Supreme Court held that the protections of the castle doctrine extended to the defendant's "yard, about 30 feet from her front door." 89 S.E.2d 725, 725 (N.C. 1955). In *Frizzelle*, the defendant, a woman three-months pregnant, was prosecuted for killing her ex-husband (and the father of her unborn child). He had come to her home one night and "called her out to his car which he had parked in the edge of her yard." *Id.* After exchanging "some words," he "grabbed her and held her"—in the yard, near where his car was parked—"and while holding her began to beat her on the head with his fist and kicked her in the stomach." *Id.* at 726. She stabbed him with a knife, and he ultimately died from the wound. Frizzelle was convicted of manslaughter, but the Supreme Court reversed her conviction, concluded that the trial court had erred in failing "to explain the law . . . with respect to her right to stand her ground and defend herself, on her own premises." *Id.*

> It is true that in most of our cases involving the right of self-defense, where the defendant had been assaulted on his own premises, such assault occurred in the home or place of business of the defendant. However, one's own premises, in this connection, will not be limited to his dwelling house only, but in any event will extend to attacks within the curtilage of the home. And the curtilage of

> the home will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings.

Id.

The New Hampshire Supreme Court's decision in *State v. Pugliese* is of the same accord. In that case, "the fatal struggle between the defendant and the decedent took place on the defendant's beach at some distance from his cottage." 422 A.2d 1319, 1321–22 (N.H. 1980). The Supreme Court held that Pugliese was entitled to a self-defense instruction:

> The State maintains that the term "dwelling" as used in the statute limits a person's privilege to use deadly force to those occasions when he is attacked within the four walls of the dwelling structure. We disagree. The common-law exception to the retreat rule applied to attacks occurring in the home, or within the "curtilage." . . . Thus, we agree that the defendant was entitled to an instruction that he could properly employ deadly force in defense of his person without retreating while outside his house but upon its grounds.

Id. at 1322.

The decision in *State v. Hewitt* offers another example of the extent of the castle doctrine's protections. *Hewitt* involved a prosecution of a husband, wife, and their two sons, for killing their neighbor, J.W. King,

who lived on a farm located across "a public highway" from the Hewitts. 31 S.E.2d 257, 257 (S.C. 1944). As the South Carolina Supreme Court explained, "[i]ll feeling had characterized the relations between them and their families for more than a year," and "this enmity culminated in the slaying of King, who at the time was standing in the highway opposite the entrance to the driveway leading into the yard of the Hewitts." *Id.* The altercation began when King

> advanced upon Mrs. Veva Hewitt . . . with a drawn knife, while she was standing within her yard near the driveway. To protect herself, she picked up a rock and threw it at the deceased . . . whereupon he dropped the knife and proceeded to throw large rocks at her, one of which grazed her body.

Id. at 258. At this point, fearing that Mrs. Hewitt "was in imminent danger of death or serious bodily harm," one of the other members of the family shot King, "who continued to stand in the highway" between their two properties. *Id.* King died from the gunshot, and Mr. and Mrs. Hewitt were convicted of manslaughter. The South Carolina Supreme Court reversed, concluding that "the jury was not sufficiently charged that one on his own premises is not held to the same rule as to the law of retreat, as is required of one not on his own premises." *Id.* at 258–59.

In the case currently before the Court, the search in question occurred in a place on Petitioner Collins's driveway "running past the house's front perimeter . .

. no more than a car's length away from the side of the dwelling," in a "portion of the driveway . . . enclosed on three sides" by the home and two brick walls. Petition at 3. As the cases just discussed make clear, had Petitioner been *assaulted* in that place adjacent to his home, in a State where the castle doctrine was in force, that rule would have protected his right to armed defense of himself and his home.

This Court should carefully consider this scope of the castle doctrine in determining the scope of the right against unreasonable searches of the home.

CONCLUSION

For the above reasons, this Court should reverse the judgment of the Virginia Supreme Court.

November 20, 2017

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No. 16-1027

In The
Supreme Court of the United States

RYAN AUSTIN COLLINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF OF *AMICUS CURIAE* RESTORE THE FOURTH, INC. IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

Restore the Fourth, Inc. ("Restore the Fourth") is a national, non-partisan civil liberties organization dedicated to the robust enforcement of the Fourth Amendment to the U.S. Constitution. Restore the Fourth believes that everyone is entitled to privacy in their persons, homes, papers, and effects and that modern changes to technology, governance, and law should foster—not hinder—the protection of this right.

To advance these principles, Restore the Fourth oversees a network of local chapters, whose members include lawyers, academics, advocates, and ordinary citizens. Each chapter devises a variety of grassroots activities designed to bolster political recognition of Fourth Amendment rights. On the national level, Restore the Fourth also files *amicus curiae* briefs in significant Fourth Amendment cases.[2]

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[1] This *amicus curiae* brief is filed with the written consent of all parties in this case. No counsel for a party authored this brief in whole or in part; nor did any person or entity, other than Restore the Fourth, Inc. and its counsel, contribute money intended to fund the preparation or submission of this brief.

[2] *See, e.g.*, Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioners, *Hernandez v. Mesa*, No. 15-118 (U.S. filed Dec. 9, 2016); Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Plaintiff-Appellee Araceli Rodriguez, *Rodriguez v. Swartz*, No. 15-16410 (9th Cir. filed May 7, 2016); Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Defendant-Appellant Stavros M. Ganias, *United States v. Ganias*, No. 12-240-cr (2d Cir. filed July 29, 2015) (en banc).

SUMMARY OF THE ARGUMENT

The Court granted review in this case to decide if "the Fourth Amendment's automobile exception permits a police officer, uninvited and without a warrant, to enter private property, approach a house and search a vehicle parked a few feet from the house." Cert. Pet. i. Unfortunately, this case has nothing to do with the automobile exception. The automobile exception legitimizes the "warrantless search *of an automobile*"—it establishes that after stopping a car, the police may with probable cause (but without a warrant) tear up the upholstery, for example, or open up a suitcase that is stored in the trunk. *California v. Acevedo*, 500 U.S. 565, 579 (1991) (emphasis added); *see also Carroll v. United States*, 267 U.S. 132, 153 (1925).

What happened in this case, however, was a warrantless search *for an automobile*. In particular, the police decided to search for a stolen motorcycle under a tarp within the curtilage of a home even though the police did not have a search warrant for the home or for the tarp. To bless this search under the Fourth Amendment, the Court would have to create a new exception to the Fourth Amendment: the garage exception. This new exception would establish that the police may conduct warrantless searches for a stolen or contraband vehicle anywhere the police have probable cause to believe the vehicle is located or garaged.

The Court should refuse to create a garage exception to the Fourth Amendment. As this case shows, a garage exception would abrogate the time-honored

common law protection of homes against warrantless searches—a protection that applies with full force even when police officers otherwise have probable cause to search a home. A garage exception would also abrogate the reasonable expectation of privacy that homeowners maintain in regard to containers on their property. A garage exception would thus "reduce[] the Fourth Amendment to a form of words." *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

ARGUMENT

I. This case is not about the "automobile exception" to the Fourth Amendment.

Officer David Rhodes wanted to find a stolen orange-and-black Suzuki motorcycle that had been used to elude the police in two traffic incidents. *See Collins v. Commonwealth*, 790 S.E.2d 611, 612–14 (Va. 2016). Officer Rhodes' investigation led him to the home of Ryan Austin Collins (Petitioner), where Rhodes could see from the street "what appeared to be a motorcycle covered with a white tarp" parked in Collins' driveway. *Id.* Officer Rhodes then "walked onto the property" without first obtaining a warrant and "[w]hile standing on the driveway . . . uncovered the motorcycle." *Id.* Officer Rhodes concluded that the motorcycle "appeared to be the same orange and black Suzuki" that he was looking for. *Id.*

A. The automobile exception legitimizes warrantless searches *of vehicles*—not warrantless searches *for vehicles* that are stolen property or contraband.

Based on the above facts, the Virginia Supreme Court concluded that what occurred in this case was, in essence, a search of a vehicle for a vehicle. *See id.* at 617 ("[W]e hold that Officer Rhodes' warrantless search of the motorcycle was justified . . . ."). If this analysis is correct, then the Fourth Amendment's automobile exception would come into play. Under this exception, the police may conduct a warrantless search of a vehicle so long as the search is supported by facts that otherwise establish probable cause for the search. *See California v. Acevedo*, 500 U.S. 565 (1991).

To explain the automobile exception, however, is to lay bare the problem with applying it in this case: one cannot search a motorcycle to find a motorcycle. This is "reasoning in a circle"—one has already found what one is looking for. *Fairchild v. St. Paul*, 49 N.W. 325, 326 (Minn. 1891). The dissent below recognized this: "Officer Rhodes did not search an automobile, he searched a tarp." *Collins*, 790 S.E.2d at 621 (Mims, J., dissenting). Or, to be more precise, Officer Rhodes searched a tarp located within the curtilage[3] of Collins' home in

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[3] "Curtilage" describes the area "immediately surrounding and associated with the home," making it "part of the home itself for Fourth Amendment purposes." *Florida v. Jardines*, 133 S. Ct. 1409, 1414–15 (2013) (quotation marks omitted). The Virginia Supreme Court did not express any doubt that Collins' driveway was part of the "curtilage" of his home. Rightly so. "Because the driveway is frequently (if not always) used for domestic purposes and

order to find a stolen motorcycle. *See id.* at 614 (majority op.).

That removes this case from the realm of the automobile exception. In *Carroll v. United States*, 267 U.S. 132, 147–53 (1925), the Court announced this exception. The Court explained that there was "a necessary difference" under the Fourth Amendment between "a search of a store, dwelling house or other structure" and "a search of a ship, motor boat, wagon or automobile, for contraband goods." *Id.* at 153. Because a "vehicle can be quickly moved out of the locality," the Court held that "contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant." *Id.*

On every major occasion the Court has spoken about the automobile exception since *Carroll*, the Court has stuck to the above view of the exception. The Court has defined the exception's scope in terms of a warrantless search *of a vehicle*—i.e., a search for something, usually contraband, located inside a vehicle.[4] In

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commonly functions as an access route to the home, a per se rule acknowledging it as part of the home's protected curtilage is entirely appropriate." Vanessa Rownaghi, *Driving Into Unreasonableness: The Driveway, the Curtilage, & Reasonable Expectations of Privacy*, 11 AM. U. J. GENDER, SOCIAL POLICY & LAW 1165, 1192 (2003).

[4] In *Cardwell v. Lewis*, the Court upheld the "warrantless examination of the exterior of a car"—namely, "examination of [a] tire on [a] wheel and the taking of paint scrapings from the exterior of [a] vehicle left in [a] public parking lot." 417 U.S. 583, 591–92 (1974). The Court based this conclusion primarily on the fact that a car "travels public thoroughfares where both its occupants and its contents are in plain view." *Id.* at 590. The Court thus implicitly

this regard, the Court has determined that the exception covers the interior of a vehicle, enclosed or obscured parts of a vehicle (e.g., trunks and glove compartments), and containers stored in a vehicle. *See, e.g.*, *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (bags in a car trunk); *Pennsylvania v. Labron*, 518 U.S. 938, 939–40 (1996) (car trunk and truck floor); *Acevedo*, 500 U.S. at 567, 580–81 (bags in a car trunk); *New York v. Class*, 475 U.S. 106, 112–14 (1986) (obscured dashboard vehicle identification number); *California v. Carney*, 471 U.S. 386, 388, 394 (1985) (interior of a mobile home); *United States v. Ross*, 456 U.S. 798, 801, 825 (1982) (bags in a car trunk); *Arkansas v. Sanders*, 442 U.S. 753, 755, 766 (1979) (suitcase in a car trunk).

The present case, by contrast, concerns a police search *for*—not *of*—a vehicle in a home driveway.[5] And that distinction is of vital importance because in "determining whether a search or seizure is unreasonable,

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acknowledged that the automobile exception—as opposed to the plain-view exception—is focused on searches of "the interior of [a] car." *Id.* at 591.

[5] After uncovering the motorcycle parked on Collins' driveway, Officer Rhodes did perform a search of the vehicle to the extent that he looked for the motorcycle's vehicle identification number. *See Collins*, 790 S.E.2d at 614. But that VIN search cannot be conflated with Officer Rhodes' initial entry onto the curtilage or uncovering of the motorcycle. *Cf. Arizona v. Hicks*, 480 U.S. 321, 324–25 (1987) (officer's movement of a record player was a search apart from the officer's initial entry into an apartment). It is those earlier searches that are at issue here in terms of whether they also fit under the automobile exception.

we begin with history. We look to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve." *Virginia v. Moore*, 553 U.S. 164, 169 (2008). This approach ensures that the Fourth Amendment continues to "afford[ ] the protection that the common law [of the founding era] afforded." *Acevedo*, 500 U.S. at 583–84 (Scalia, J., concurring). "[T]hat includes the requirement of a warrant, where the common law would have required a warrant." *Id.*

B. The common law of the founding era required warrants for police searches aimed at uncovering contraband or stolen property in private places.

The history and common law of the founding era reveal that a special warrant was required to authorize searches for contraband or stolen property in private places. This is best seen in James Otis's argument on behalf of a group of colonial merchants against Crown officers seeking to broaden their customs inspection power in America. *See People v. Case*, 190 N.W. 289, 300–01 (Mich. 1922) (Wiest, J., dissenting) (detailing Otis's speech). Otis explained in his argument that "[i]t had been a common practice, till of late years, for the [Crown] officers of the customs, with no authority but that derived from their commissions, to enter warehouses, and even dwelling-houses, and search them for contraband goods." *Id.*

Otis continued: "The people being naturally indignant, that the sanctity of their homes should be violated, and for such a purpose . . . the custom was gradually limited, till only special warrants were issued for searching particular places, in which there was reason to believe that smuggled goods were concealed . . . ." *Id.* But the "revenue officers were not satisfied with the[se] limited powers"—they wanted general authority to "break open and ransack any houses that [they] saw fit." *Id.* And once this general authority was given to them, they quickly became "inquisitor-general[s] for the whole province, opening the dwelling-place and exposing the property of every inhabitant to [their] perquisition." *Id.*

Otis's argument changed the nation. John Adams remarked that "American Independence was then and there born." *Id.* The same may be said of the Fourth Amendment, which bars "unreasonable searches" by requiring search warrants to be issued based "upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Amendment thus codifies the "special warrants" that Otis described as the product of founding era outrage against warrantless searches of private places like homes for contraband. The Framers recognized that without the limits set by the Fourth Amendment on police searches, "the liberty of every man" would rest "in the hands of every petty officer." *Boyd v. United States*, 116 U.S. 616, 625 (1886).

The same history attends government searches for stolen property. It was "not at common law legal" during the founding era for government officers to be able "to search all suspected places for stolen goods . . . because it would be extremely dangerous to leave it to the discretion of a common officer to . . . search what houses he thinks fit." 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 66 (1841). Officers instead needed a particularized warrant and state courts were vigilant in enforcing this rule. In *Grumon v. Raymond*, for example, Connecticut's high court condemned a warrant that authorized the police to "[s]earch every house, store or barn within the town of Wilton that is suspected of having certain bags concealed in it, said to be stolen." 1 Conn. 40, 43 (1814). The court observed that "this warrant was such as no justice ought to have issued." *Id.*

In light of this history, the common law of the founding era would have required a warrant for the searches at issue in this case. *Cf. Acevedo*, 500 U.S. at 583 (Scalia, J., concurring). Officer Rhodes sought without a warrant to uncover "contraband" or "stolen property" in a private place—i.e., under a tarp within the curtilage of a home. *Collins*, 790 S.E.2d at 617. This is precisely the kind of police conduct that Americans of the founding era most feared. Is it then "conceivable that the [American] people . . . after so strenuously fighting" warrantless searches of this kind "left a loophole" in the Fourth Amendment allowing them? *Case*, 190 N.W. at 301 (Wiest, J., dissenting).

The question answers itself. "[W]e know the Fourth Amendment is no less protective of persons and property against governmental invasions than the common law was at the time of the founding." *United States v. Ackerman*, 831 F.3d 1292, 1307 (10th Cir. 2016) (Gorsuch, J.). Hence, given that the common law of the founding era would have required a warrant in this case and Officer Rhodes did not have one, the Fourth Amendment invalidates Officer Rhodes' conduct unless: (1) the record reveals some other common law basis for excusing the warrant requirement; or (2) the Court is prepared to recognize a brand new exception to the Fourth Amendment.[6]

The first circumstance does not apply here. The decision below advances two main rationales for upholding Officer Rhodes' warrantless conduct: probable cause and the need to secure a vehicle (i.e., readily movable property). *See Collins*, 790 S.E.2d at 617–18. But neither of these rationales would have served during the founding era to excuse the common-law warrant requirement for a contraband or stolen-property search of a private place, especially a home.

Writing for the Court in *Johnson v. United States*, Justice Jackson makes it clear why the probable-cause rationale is unavailing: "Any assumption that

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[6] While other established Fourth Amendment exceptions (e.g., exigency) might in theory apply to Officer Rhodes' conduct, no basis exists for the Court to consider these exceptions because either they were not raised or they were not decided below. *Cf. CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1654 (2016) ("[T]his is a court of final review and not first view.").

evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify officers in making a search without a warrant would reduce the [Fourth] Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." 333 U.S. 10, 14 (1948).

This leaves the vehicle-movability rationale, which does not vitiate the common-law warrant requirement for two reasons. First, this rationale "makes the thing sought for seizure the controlling idea"—i.e., the vehicle—when the common law of the founding era protected private places like homes against warrantless searches *regardless* of the thing sought for seizure, including contraband and stolen property. *Case*, 190 N.W. at 296 (Wiest, J., dissenting). Second, there is nothing to indicate that the common law of the founding era would have allowed warrantless searches of private homes or barns for stolen horses—a conveyance that raises the exact same kind of vehicle-movability concerns that automobiles and motorcycles do today.[7]

In fact, the common law of the founding era and later generations contemplated the opposite: that searches for stolen horses in private places required a warrant. As one legal treatise of the era explained, in

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[7] This analogy is especially apt given that motorcycles are often described in the vernacular as "iron horses." *See, e.g.*, *Kelly v. Hochberg*, 217 P.3d 699, 700 (Or. Ct. App. 2009) ("Plaintiff participated in an annual gathering of motorcycle riders from the west coast, known as the Iron Horse Rodeo.").

the case of a person who suspected "his horse [to be] concealed in the stable of another person," a search warrant was properly issuable based on the person's ability to "conscientiously swear [that] he suspects [the horse] to have been stolen." 5 RICHARD BURN & JOSEPH CHITTY, THE JUSTICE OF THE PEACE & PARISH OFFICER 355 (1831); *see also, e.g.*, *Byrnside v. Burdett*, 15 W. Va. 702, 715–16 (1879) (holding that a search warrant for a stable and stolen horse was void for lack of a proper oath); *Ashley v. Peterson*, 25 Wis. 621, 624, 1870 Wisc. LEXIS 96, at *1–2, 4–5 (1870) (holding that a search warrant for two stolen horses was void insofar as the warrant effectively authorized the sheriff to "search the premises of anybody in the town of Baraboo").

II. The Court should not recognize a "garage exception" to the Fourth Amendment.

Since the common law of the founding era offers no support for a warrantless police search of a home (including its curtilage) for a stolen conveyance, the only other way that Officer Rhodes' conduct may be upheld in this case is if the Court recognizes a new exception to the Fourth Amendment: the garage exception. This exception would establish that because of the inherent mobility of vehicles, the police may conduct warrantless searches for a stolen or contraband vehicle anywhere the police have probable cause to believe the vehicle is located or garaged. This exception would be

a bright-line rule, requiring no exigency and respecting no distinction between public and private places.[8]

The Court should not go down this path. The "basic rule of Fourth Amendment jurisprudence" is that "searches conducted outside the judicial process . . . are *per se* unreasonable." *Ross*, 456 U.S. at 825. The Court has recognized "a few specifically established and well-delineated exceptions" to this rule—but only a few. *Id.* It does not behoove the Court to grow this list, especially when a purported exception has no basis in the common law of the founding era. As shown above, recognizing a "garage exception" to the Fourth Amendment would be at direct odds with the founding era's commitment to limiting warrantless searches of private places. But that is not the worst of it.

A. A "garage exception" to the Fourth Amendment would abrogate the time-honored common law protection of the home against warrantless searches.

Time and again, this Court has emphasized the special status of the home under Fourth Amendment. "[W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental

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[8] All of this is visible in the decision below, which tracks all the elements of the "garage exception" in affirming Officer Rhodes' conduct. *See Collins*, 790 S.E.2d at 617–20.

intrusion." *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (quotation marks omitted). The Fourth Amendment accordingly draws "a firm line at the entrance to the house"—including its curtilage—and this Court has staked out a proactive role in ensuring that this line is not crossed. *Payton v. New York*, 445 U.S. 573, 590 (1980); *see Kyllo v. United States*, 533 U.S. 27, 35–36 (2001) (refusing to "leave the homeowner at the mercy of advancing technology" that stood to diminish the Fourth Amendment's protection of the home).

The special place that the home occupies under the Fourth Amendment is no accident. It traces back to the frequent warrantless invasions of the home by Crown agents during the founding era. These invasions were so disturbing that one British jurist was compelled to declare that "to enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition." *State v. Ochoa*, 792 N.W.2d 260, 270 (Iowa 2010) (quoting Chief Judge Pratt). Based on this history, this Court has recognized that the "Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects." *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990).

A person's home, in turn, consists of "not only the main house, but all of the cluster of buildings convenient for the occupants of the premises." *Temperani v. United States*, 299 F. 365, 366–67 (9th Cir. 1924). "Within this definition the garage comes clearly within the protection of the Constitution." *Id.* at 367. In *Temperani v. United States*, the Ninth Circuit enforced this

protection, rebuking police officers who "entered the garage" of a suspect without a warrant "to make a search of the premises." *Id.* The court explained that "the violation of rights guaranteed by the Constitution cannot be tolerated or condoned. If present laws are deficient in not permitting [a] search in a constitutional way . . . the remedy is with Congress, not in subterfuge or evasion." *Id.*; *see Agnello v. United States*, 269 U.S. 20, 33 (1925) (endorsing *Temperani*).

The constitutional protection of a garage as part of the home is relevant here because of the tarp that Officer Rhodes had to remove to uncover the stolen motorcycle that he was looking for. *See Collins*, 790 S.E.2d at 614. The tarp may be readily analogized to a garage for the motorcycle, covering and storing the vehicle in the same way that a full-fledged home garage would. And once the tarp is viewed in this light, it becomes apparent that affirming Officer Rhodes' warrantless conduct here "would unleash a principle of constitutional law that would have no obvious stopping place." *Luis v. United States*, 136 S. Ct. 1083, 1094 (2016).

This is because there is no material difference between the warrantless removal of a tarp on a home driveway to pursue a probable-cause search for a stolen vehicle and any of the following acts:

- Warrantless opening of a shed to search for a stolen vehicle that can be seen from a distance through a gap in the shed doors;

- Warrantless lifting of closed garage door to search for a stolen vehicle that is visible from the street through a garage window;
- Warrantless entry into a house to search for a stolen vehicle that a porch window reveals to be parked in the living room.[9]

A popular film affords a vivid way to appreciate this point. In *Ferris Bueller's Day Off*, protagonists Ferris Bueller and Cameron Frye decide to go for a joyride in a 1961 Ferrari 250 GT California owned by Frye's father.[10] The Ferrari is parked in the Fryes' home garage: a spacious room surrounded by large glass windows overlooking a ravine.[11] Bueller and Frye succeed in taking the Ferrari, but in the course of returning it, Frye accidentally causes the car to crash through one of the garage's glass windows and fall into the ravine below. Assuming a movie in which this accident had never happened—and one in which the police were engaged in an active investigation of a stolen Ferrari—would the police have been free to enter the Fryes' glass garage without a warrant so long as they had

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[9] The idea of a vehicle being parked in someone's living room is not as far-fetched as it might sound. *See, e.g.*, *Florida Man Parks BMW Vehicle in His Living Room to Protect It from Hurricane*, Fox 5 News-D.C., Oct. 10, 2016, http://bit.ly/2AJDXoW; Alex Harris, *Full Garage? No Problem! Couple Stores Car Inside the House During Hurricane Matthew*, Miami Herald, Oct. 7, 2016, http://hrld.us/2dSKjLO.

[10] Ferris Bueller's Day Off (Paramount Pictures 1986).

[11] *See* Dennis Rodkin, *Here's Why That* Ferris Bueller *House Is So Hard to Sell*, Chicago Mag., Aug. 7, 2013, https://goo.gl/cpNxiW ("The 1974 pavilion . . . . has a kitchen and a bedroom, but it's mostly a four-car show garage.").

probable cause to believe the Ferrari was located there?

Color photograph of the glass garage and Ferrari depicted in *Ferris Bueller's Day Off*.[12]

If the Court recognizes a "garage exception" to the Fourth Amendment, the answer must be 'yes': the police may conduct a warrantless search of any place they have probable cause to believe a stolen vehicle is located. This would then legitimize Officer Rhodes' warrantless search of the tarp in this case. It would also open the home of every American to warrantless police searches on a scale not countenanced since the founding era. The vast majority of Americans own at

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[12] *See* AJ LaTrace, *The Famous Ferrari House from 'Ferris Bueller' Has Finally Sold*, CURBED CHICAGO, May 30, 2014, http://bit.ly/2zWKBLm (photo by Coldwell Banker Residential).

least one car[13] and "on average, cars are parked 95% of the time."[14] If the mere presence of a vehicle on a home driveway—or in a home garage—coupled with probable cause is all the police need to enter a home and its curtilage, then the Fourth Amendment is "reduce[d] . . . to a form of words." *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920); *cf. Riley v. California*, 134 S. Ct. 2473, 2484, 2494–95 (2014) (recognizing the danger of warrantless cellphone searches given the modern ubiquity of cellphones).

The fact that Officer Rhodes' conduct in this case was directed at a tarp rather than a full-fledged garage makes no difference. The Fourth Amendment stands for the proposition that the "poorest man may, in his cottage, bid defiance to all the forces of the Crown." *Miller v. United States*, 357 U.S. 301, 307 (1958). This means the police cannot get a free pass for a tarp, which may be the only kind of garage that the poorest man can afford. *See Boyd*, 116 U.S. at 616 ("It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."); *Georgia v. Brailsford*, 3 U.S. 1, 4–5 (1794) (Jay, C.J.) ("Justice is indiscriminately due to all, without regard to numbers, wealth, or rank.").

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[13] *See* Matt Schmitz, *How Many Cars Does the Average American Own*, CARS.COM, Mar. 15, 2017, http://bit.ly/2ms7ZVE.

[14] David Z. Morris, *Today's Cars Are Parked 95% of the Time*, FORTUNE, Mar. 13, 2016, http://for.tn/1ppncsK.

B. A "garage exception" to the Fourth Amendment would abrogate the reasonable expectation of privacy that homeowners maintain in regard to containers on their property.

One way to look at a tarp covering a vehicle parked on a home driveway is as a makeshift garage. Another way is as a container. The latter perspective matters because "the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view." *Ross*, 456 U.S. at 822–23. This protection then provides independent confirmation that: (1) upholding Officer Rhodes' warrantless tarp search here would require the Court to recognize a new "garage exception" to the Fourth Amendment; and (2) recognizing a "garage exception" would undermine the Fourth Amendment's protection of the home and its containers on an equal basis.

All of this stems from how the Fourth Amendment limits container searches. Fourth Amendment protection of any given container "varies in different settings." *Ross*, 456 U.S. at 823. For example, bags "carried by a traveler entering the country may be searched at random by a customs officer." *Id.* The same bags may not be searched during a traffic stop, however, absent probable cause. *See Acevedo*, 500 U.S. at 580 ("The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.").

Containers thus absorb the Fourth Amendment status of their surroundings. When a container is located in a place where Fourth Amendment protection is at its lowest, like at the border, the container takes on this quality and may be searched without cause. And when a container is located in a place that is already subject to search under the Fourth Amendment, the container may be treated as an extension of the place. For example, if "there is probable cause to search . . . a car," then the police may also search containers in the car without needing to show "individualized probable cause for each one." *Wyoming v. Houghton*, 526 U.S. 295, 302 (1999).

What about a container located in a home—a place where Fourth Amendment protection is at its peak? The same principle applies. The container may be searched only on terms equal to those of the place where the container is located. For the home, those terms are as follows: "Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause." *Agnello v. United States*, 269 U.S. 20, 33 (1925); *see id.* at 32 ("[I]t has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein.").

No search of a container located in a home (or within its curtilage) may therefore rest on probable

cause alone—a warrant for the home or the container is required. *Cf. Ross*, 456 U.S. at 821 ("[A] warrant that authorizes an officer to search a home . . . also provides authority to open closets, chests, drawers, and containers in which the [object sought] might be found."). Officer Rhodes' warrantless tarp search must then fail under the Fourth Amendment.[15] *Cf. Camara v. Mun. Court*, 387 U.S. 523, 528–29 (1967) ("[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant.").

The only way for the Court to reach the opposite conclusion is by recognizing a new exception to the Fourth Amendment that fits the contours of Officer Rhodes' conduct—i.e., the "garage exception." This would then result in a house divided under the Fourth Amendment, with the containers of a home receiving less constitutional protection than the home itself. That is reason enough for the Court to reject the "garage exception." There is "no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the nonintimate rug on the vestibule floor." *Kyllo*, 533 U.S. at 37. There is also no exception to the warrant requirement for the officer

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[15] This Court's precedents dispose of any suggestion that the menial or inexpensive nature of a tarp weighs against affording this container the same Fourth Amendment protection as other containers that may be found within the home or its curtilage. *See Ross*, 456 U.S. at 822 (highlighting the Court's "virtually unanimous agreement" that "a constitutional distinction between 'worthy' and 'unworthy' containers would be improper").

who removes a tarp that contains a vehicle parked within the curtilage of a home.

CONCLUSION

The Fourth Amendment establishes that a person's home is their "castle" and it is "not to be invaded by any general authority to search." *Weeks v. United States*, 232 U.S. 383, 390 (1914). That principle was violated here when Officer Rhodes conducted a warrantless search of a tarp within the curtilage of Petitioner's home. That Rhodes was searching for a stolen vehicle does not excuse the violation. The "ready mobility" of a stolen vehicle may, of course, "create[ ] a risk" that the vehicle "will be permanently lost while a warrant is obtained." *Houghton*, 526 U.S. at 304. But that risk cannot justify putting a hole in the Fourth Amendment big enough to drive a Ferrari through—or, for that matter, a stolen orange-and-black Suzuki motorcycle.

Respectfully submitted,

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Dated: November 17, 2017

No. 16-1027

In The Supreme Court of the United States

RYAN AUSTIN COLLINS,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

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QUESTION PRESENTED

Whether the Fourth Amendment's automobile exception permits a police officer, uninvited and without a warrant, to enter private property, approach a home, and search a vehicle parked a few feet from the house.

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INTEREST OF *AMICUS*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing *pro bono* legal representation to individuals whose civil liberties are threatened and in educating the public about constitutional and human rights issues. At every opportunity, The Rutherford Institute will resist the erosion of fundamental civil liberties that many would ignore in a desire to increase the power and authority of law enforcement. The Rutherford Institute believes that where such increased power is offered at the expense of civil liberties, it achieves only a false sense of security while creating the greater dangers to society inherent in totalitarian regimes.

The Rutherford Institute is interested in this case because the Institute is committed to ensuring the continued vitality of the Fourth Amendment. The expansion of the automobile exception to any

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for the parties received timely notice of the intent to file this brief under Rule 37, and provided their written consent.

situation involving a vehicle or vehicle identification number will allow the exception to swallow the rule. Accordingly, the Supreme Court of Virginia erred when it applied the automobile exception to the Fourth Amendment warrant requirement in this situation, where a vehicle was not searched. Such a sweeping application of the automobile exception would effectively sanction law enforcement to cross constitutionally protected thresholds without a warrant and simply cite the automobile exception as justification for their conduct.

SUMMARY OF THE ARGUMENT

This case has focused on the parameters of the automobile exception, but properly interpreted the exception should not apply at all here.

The automobile exception has been broadly construed, but it has its limitations. It was first created to allow the warrantless search of vehicles because of the uniquely mobile nature of automobiles. But a search ***of*** a vehicle is vastly different than a search ***for*** a vehicle, and the policy justifications underlying the exception simply do not apply to searches for vehicles.

ARGUMENT

I. THE AUTOMOBILE EXCEPTION APPLIES TO WARRANTLESS SEARCHES *OF* A VEHICLE AND CANNOT JUSTIFY A SEARCH *FOR* A VEHICLE.

As Justice Mims stated in his dissent below, "[t]he automobile exception permits a warrantless search ***of*** a vehicle, not ***for*** a vehicle." *Collins v. Virginia*, 790 S.E.2d 611, 622 (Va. 2016) (emphasis added) (Mims, J., dissenting).

The exception was born in a Prohibition-era case of a warrantless search of an automobile suspected of transporting liquor. *Carroll v. United States*, 267 U.S. 132 (1925). In that case, prohibition agents had probable cause to believe bootleggers were using a vehicle to smuggle liquor. *Id.* at 135-36. Upon searching the vehicle, they found 68 quarts of whisky and gin concealed in the upholstering. *Id.* at 136. Chief Justice Taft, writing for the majority in that case, examined the history of the Fourth Amendment and found that, contemporaneously with its adoption, Congress distinguished between "the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant." *Id.* at 151. The Court thus created an exception for a warrantless

search for contraband goods "concealed and illegally transported ***in*** an automobile or other vehicle." *Id.* at 153 (emphasis added); *see also United States v. Ross*, 456 U.S. 798, 809 (1982) ("[T]he exception to the warrant requirement established in *Carroll* . . . applies only to ***searches of vehicles*** that are supported by probable cause.") (emphasis added). That justification does not apply here, where no vehicle was searched.

A. The Automobile Exception Does Not Apply Simply Because a Vehicle Was Uncovered in a Search.

The only thing searched in this case was the tarp covering a motorcycle. Under these facts, the automobile exception is irrelevant to the legality of the search.

A simple illustration makes the point: if, in place of the motorcycle, the tarp revealed a stolen stereo, or bag of cocaine, or any other type of contraband or illegal substance, even if those items were on wheels or in a wagon, the automobile exception could not be invoked.[2] The fact that police were looking for a motorcycle rather than these

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[2] The default rule under this Court's precedent is that "the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view." *Ross*, 456 U.S. at 822-23 (citing *Robbins v. California*, 453 U.S. 420, 427 (1981)).

other items does not change the analysis; "[i]t is an elementary maxim that a search, seizure or arrest cannot be retroactively justified by what is uncovered." *United States v. Como*, 340 F.2d 891, 893 (2d Cir. 1965). Put another way, it is the nature of a search, not what is uncovered, on which constitutionality turns. *See United States v. Garcia*, 605 F.2d 349, 352 (7th Cir. 1979) (Fourth Amendment search was of defendant's luggage, in which heroin was found); *United States v. Canada*, 527 F.2d 1374, 1376 (9th Cir. 1975) (Fourth Amendment search was of defendant's suitcase, which revealed large sums of cash); *United States v. Bulgier*, 618 F.2d 472, 473 (7th Cir. 1980) (Fourth Amendment search was of defendant's bags, where police found cocaine); *United States v. Carhee*, 27 F.3d 1493, 1495-96 (10th Cir. 1994) (Fourth Amendment search was of defendant's briefcase, which was carrying cocaine).

This Court's Fourth Amendment jurisprudence is replete with application of the automobile exception to warrantless searches of vehicles and containers found inside them. *See, e.g., Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (warrantless search of a vehicle uncovering a large quantity of cocaine was proper under the automobile exception); *California v. Acevedo*, 500 U.S. 565, 580 (1991) (warrantless search of a closed container within a vehicle was proper under the automobile exception even if officers lacked probable cause to

search the entire car); *Ross*, 456 U.S. at 825 (warrantless search of a vehicle and subsequent search of a container therein was proper under the automobile exception); *Chambers v. Maroney*, 399 U.S. 42, 52 (1970) (warrantless search of a vehicle already in the physical custody of police was proper under the automobile exception).

But the Court has never applied the exception wholesale to a case simply because an automobile figured in a search. To the contrary, as Justice Stewart stated more than four decades ago, "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge v. New Hampshire*, 403 U.S. 443, 461 (1971). Nor has the Court ever used such broad or expansive language in describing the exception such that it would apply to the search here. Were the Court to hold the exception to apply in these circumstances, it would be broadening its precedents and creating a whole new exception to the warrant requirement.

The fact that the automobile exception does not apply to examination of a vehicle identification number ("VIN") proves the point. Searches of VIN numbers are not analyzed under the exception even though they are found on an automobile. To the contrary, this Court has found VIN numbers to be unprotected because they are placed in plain view on the automobile. *New York v. Class*, 475 U.S. 106 (1986). Although an automobile was involved in the

search in *Class*, the automobile exception did not factor into the Court's analysis. The Court simply found that "[b]ecause of the important role played by the Vehicle Identification Number ... in the pervasive governmental regulation of the automobile and the efforts by the Federal Government to ensure that the VIN is placed in plain view, there is no reasonable expectation of privacy in the VIN." *Id.* at 114. This is not to say that a search for a VIN number is always constitutionally permissible, only that the happenstance of the search involving an automobile does not by definition give rise to an automobile exception analysis.[3]

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[3] Lower courts, too, recognize limits to the automobile exception. *United States v. Ortiz*, 878 F. Supp. 2d 515, 536 (E.D. Pa. 2012) ("The automobile exception does not apply to permit the government's warrantless installation and monitoring of a GPS tracking device."); *United States v. Fields*, 456 F.3d 519, 524-25 (5th Cir. 2006) ("[W]e have concluded that automobile exception may not apply when a vehicle is parked at the residence of the criminal defendant challenging the constitutionality of the search."); *United States v. O'Connell*, 408 F. Supp. 2d 712, 723 (N.D. Iowa 2005) ("Because the van's immobility was readily apparent ... the automobile exception does not apply."); *United States v. Ellison*, 462 F.3d 557 (6th Cir. 2006) (addressing whether an individual has a reasonable expectation of privacy in his license plate without applying the automobile exception).

Here, the mere presence of a motorcycle cannot refashion this search of a tarp into a search that warrants the application of the automobile exception. The cases cited by the majority in the decision below are either inapposite or wrong. *See Collins*, 790 S.E.2d at 621 n.11 (citing four cases for the proposition that "courts typically describe [a] search [involving a tarp] as a search of the contraband rather than a search of the tarp itself"). Three of those cases turned on whether a person could have a legitimate expectation of privacy in objects or things in public places such that the Fourth Amendment would apply. *See State v. Allen*, 166 P.3d 111, 115-16 (Ariz. 2007) (lifting of car cover of vehicle parked in public parking lot was not a Fourth Amendment search); *State v. Tegland*, 344 P.3d 63, 69 (Or. App. 2015) (no Fourth Amendment search of a tarp covering a shelter blocking a public sidewalk); *United States v. Rosado*, No. 93 Cr. 785 (RPP), 1994 WL 285878, at *4 (S.D.N.Y June 28, 1994) (Fourth Amendment did not apply to lifting of tarp covering car in public garage). Here, there is no question but that the Fourth Amendment applies; the question is whether an exception also does.

In the fourth case, *State v. Emmons*, 386 N.E.2d 838 (Ohio App. 1978), the Ohio Court of Appeals upheld the constitutionality of a warrantless search of a tarp covering two motorcycles parked in a private driveway. But the court in that case, like the court below here, simply

assumed that the automobile exception applied without distinguishing between a search for a vehicle and the search of a vehicle. *See id.* at 844 (citing *Cady v. Dombrowski*, 413 U.S. 433, 442 (1973), an automobile exception case, for the proposition that "the procedure followed here was not unreasonable within the meaning of the Fourth Amendment"). The court in *Emmons* got it wrong.

Were the automobile exception to apply to this situation, police could effectively shirk the warrant requirement by invoking the automobile exception in any and all circumstances involving a vehicle. Such a broad expansion of the exception cannot stand. *See Boyd v. United States*, 116 U.S. 616, 635 (1886) ("[I]llegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.").

B. The Automobile Exception Was Created To Address Concerns that Do Not Apply to this Type of Search.

This Court originally fashioned the automobile exception in response to the uniquely mobile nature of vehicles as compared to other searchable things:

> [T]he guaranty of freedom from unreasonable searches and seizures by the Fourth

> Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure . . . and . . . a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Carroll, 267 U.S. at 153.

Later, a second justification emerged: "a reduced expectation of privacy . . . [in] a licensed motor vehicle [because it is] subject to a range of police regulation inapplicable to a fixed dwelling." *California v. Carney*, 471 U.S. 386, 393 (1985); *see also Cady*, 413 U.S. at 442 ("The constitutional difference between searches of and seizures from houses and similar structures and from vehicles stems both from the ambulatory character of the latter and from the fact that extensive, and often noncriminal contact with automobiles will bring local officials in 'plain view' of evidence, fruits, or instrumentalities of a crime, or contraband.").

Cognizant of these rationales for the automobile exception, the Ninth Circuit found the search of a car cover unconstitutional in a closely analogous case. In *United States v. $277,000.00 U.S. Currency*, 941 F.2d 898 (9th Cir. 1991), the

government obtained a civil forfeiture of a Dodge Ram Charger and $277,000 found in the vehicle, which was covered and parked in the backyard of a home when the police conducted the search. After uncovering the Charger and locating the VIN, the police believed the vehicle was stolen. *Id.* at 899-900. The government contended that "the officers were justified in removing the cover[] from the vehicle[] without probable cause to inspect for the VIN[]." *Id.* at 901. The court disagreed, holding that "the removal of the car cover without probable cause was an unlawful search." *Id.* at 902.

While the court's determination thus turned on a finding of probable cause, its analysis of the automobile exception considerations is instructive. First, the court noted that the vehicle at issue was not being driven on a road; it was parked in a backyard. *Id.* Accordingly, the concern of mobility did not apply. *See also Coolidge*, 403 U.S. at 461 n.18 (the automobile exception does not apply to "a warrantless search of an unoccupied vehicle, on private property and beyond the scope of a valid search incident to an arrest"). Second, "[t]he occasion for the inspection was not brought about by traffic violations." *$277,000.00 U.S. Currency*, 941 F.2d at 902. Therefore, the search did not implicate the justification around public regulation of vehicles.

So, too, here. The motorcycle was parked and covered in the curtilage of a home. There was no moving violation or other traffic infraction at play.

In these circumstances, mobility and the necessity of vehicle regulations cannot be used as after-the-fact justifications for a search that did not involve a vehicle but simply uncovered one.

CONCLUSION

"The automobile exception . . . is coming close to swallowing the rule of the warrant requirement." Kendra Hillman Chilcoat, *The Automobile Exception Swallows the Rule:* Florida v. White, 90 J. Crim. L. & Criminology 917, 950 (1999-2000). Finding that a search meets the automobile exception merely because a vehicle is found would further distort the bounds of what was intended to be a "specifically established and well-delineated exception[]" to the *per se* unreasonableness of a search conducted outside the judicial process. *Katz v. United States*, 389 U.S. 347, 357 (1967). This the Court should not do.

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